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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1930

No. 484

FEDERAL TRADE COMMISSION, PETITIONER

vs.

RALADAM COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 27, 1930
CERTIORARI GRANTED NOVEMBER, 3, 1930

(35406)

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UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION

In the matter of Raladam Company, } Docket No. 1496

I, Otis B. Johnson, secretary of the Federal Trade Commission, do hereby certify that transmitted herewith is a full, true and correct transcript of proceedings had before the Federal Trade Commission in the above entitled matter, consisting of:

Part 1—Pleadings and Testimony

Part 2—Exhibits (original)

and other original exhibits marked:

1	2	3	4
1496	1496	1496	1496

That, with approval of Court, all exhibits are to be treated as physical exhibits and not printed in the transcript of the record, pursuant to stipulation between counsel, dated June 27, 1929, attached hereto; and

That this transcript is certified to the United States Circuit Court of Appeals for the Sixth Circuit, pursuant to the filing in said Court of a petition for review of an Order to Cease and Desist, dated April 13, 1929, entered by the Federal Trade Commission in that proceeding.

In witness whereof, I hereunto subscribe my name, and affix the seal of the said Federal Trade Commission, at its office in the City of Washington, D. C., this 26th day of August, A. D., 1929.

Otis B. Johnson,
Secretary.

(Seal)

STIPULATION AS TO EXHIBITS—Received July 3, 1929.

It Is Hereby Stipulated and Agreed, by and between counsel for the respective parties in this cause:

That, with the approval of the Court, Commission's Exhibits Numbers One to Twelve, inclusive, and Respondent's Exhibit Number One be treated as physical exhibits and be not printed in the transcript of the record.

Stevenson, Butzel, Eaman & Long,
Attorneys for Petitioner,
Robt. E. Healy, Chief Counsel, Federal Trade Commission,
Attorney for Respondent.

June 27, 1929.

UNITED STATES OF AMERICA
Before Federal Trade Commission.

In the Matter of
Raladam Company. } Docket No. 1496

COMPLAINT.

Acting in the public interest pursuant to the provisions of an Act of Congress, approved September 26, 1914, entitled, "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission charges that Raladam Company, a corporation, hereinafter referred to as respondent, has been and is using unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of said Act, and states its charges in that respect as follows:

Paragraph One: Respondent, Raladam Company, is

a corporation organized and existing under and by virtue of the laws of the State of Michigan, and maintains its office and principal place of business at the City of Detroit in the State of Michigan.

Paragraph Two: Respondent is engaged in the manufacture or preparation of a certain medical preparation or compound for internal use by human beings, the same being made into the form of tablets of a size suitable for use by taking the same into the mouth and swallowing the same. Said compound is alleged to be useful and effective in dissolving and removing excess flesh of the human body. Said compound is commonly referred to by respondent as an "obesity cure," and is sold under the trade name of "Marmola Prescription Tablets."

Paragraph Three: Respondent offers said compound for sale, and sells the same, to its customers in and throughout the several States of the United States. Aside from the sale of a small portion thereof at retail, respondent sells said compound in wholesale lots to wholesalers and jobbers located and doing business in the several States of the United States, by whom the same is resold to retail dealers in the several states, who in turn resell the same to retail purchasers or consumers. Respondent, when said compound is so sold by it, causes the same to be transported from its said place of business in the City of Detroit in the State of Michigan, into and through other states of the United States to said purchasers thereof at their respective points of location or places of business.

Paragraph Four: Respondent so offers for sale, and sells, said compound in competition with other persons in and throughout the several states of the United States who are likewise engaged in offering for sale, and selling, printed professional advice, books of information and instruction, and other methods and means and certain remedies and appliances for dissolving or otherwise removing excess flesh of the human body.

Paragraph Five: Respondent, in aid of the sale of said compound, causes the same to be advertised in newspapers, magazines, periodicals, and other publications of general circulation in the United States and the several states thereof, and in printed matter upon labels attached to, or in circulars wrapped about or enfolded within, the boxes in which such tablets are primarily packed for shipment, and affixed to cartons or other containers used in packing and shipping to purchasers such smaller boxes of said tablets. In all the aforesaid advertisements, respondent makes statements and assertions: (1) that

the preparation of said compound is the result of, and is based upon, scientific research, knowledge and accuracy; (2) that its medical properties are safe, pleasant and effective in their action in the removal of excess flesh from the human body; (3) that the same may be used by purchasers thereof without discomfort, inconvenience or danger of harmful results to the physical health of such users of said compound; (4) and that said Marmola is a scientific method for the treatment of obesity and is based on many years of scientific research in the United States of America and in foreign lands.

In said advertisements and also in a small pamphlet that is packed, shipped and delivered to retail purchasers with each box of said tablets is printed what purports to be the formula by which said product is prepared and the several ingredients therein contained. Among said ingredients is "Desiccated Thyroid." Respondent's principal claim for the medicinal quality and virtue of said compound is based upon the alleged fact that said tablets contain said thyroid, which ingredient is made from the thyroid gland of food animals and is claimed by respondent and popularly believed to be of value and effectiveness in the reduction of the fatty portions of the human body.

In truth and in fact, scientific research has not so far progressed that any person or persons may be able to prescribe or prepare for use in said tablets so to be sold to the public, an amount of said thyroid, or a combination of other ingredients with said thyroid:

(1) That will act with a reasonable degree of uniformity upon the bodies of all users thereof;

(2) That will be sufficient to be generally effective for the reduction of the excess flesh of the users thereof, without imperiling the health of a substantial portion of such users and without danger of bringing to such substantial portion injurious results to physical health requiring the service of skillful physicians successfully to neutralize or counteract such injurious results;

(3) That may safely be used by any individual purchasers thereof, without previous consultation with a competent medical adviser and reliance upon his continuing observation and advice.

It is the truth and a fact, and all physicians and other students of thyroid as a remedial agent are of the opinion, that:

(1) Thyroid, when introduced into the human body, is a powerful agent liable at all times to produce radical changes of conditions that will be harmful to the user thereof.

(2) Such harmful changes may safely be guarded against in any case only by the previous and continuing investigation, observation and advice of a competent physician.

(3) The use of thyroid for the reduction of excess flesh under the direction of a competent physician is fraught with possible injury and calls for constant professional observation, medical skill and care.

(4) The use indiscriminately by all purchasers of said tablets, without other information, guidance or advice than is furnished by respondent as aforesaid, can be made harmless and safe only by reducing the amount of said thyroid so used in said tablets so greatly as to be ineffectual as such remedial agent.

Paragraph Six: In and throughout the several States of the United States are many persons who are seeking some safe and dependable means whereby they may quickly and permanently rid their bodies of excess fat or of portions of the flesh which they now bear and of which they desire to be rid. Said statements and representations so made by respondent in said advertisement, labels and pamphlets have the tendency and capacity to mislead and deceive the purchasing public into the belief that said compound as such remedial agent for the reduction of excess fat or other flesh:

(1) Is a scientifically accurate method of treatment.

(2) Is the result of many years of scientific research in the United States and foreign countries.

(3) Is a safe, effective, and dependable remedy that may be used by any and all purchasers thereof without inconvenience, sacrifice, or danger of harmful results to physical health.

Paragraph Seven: The acts and practices of the respondent are all to the prejudice of the public and of competitors of respondent, Raladam Company, and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of an Act of Congress entitled "An Act To Create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

Complaint

Wherefore, The Premises Considered, the Federal Trade Commission, on this the 29th day of February, A. D., 1928, now here issues this its complaint against said respondent.

NOTICE.

Notice is hereby given you, Raladam Company, a corporation, respondent herein, that the 30th day of April, A. D., 1928, at 10:30 o'clock in the forenoon, is hereby fixed as the time, and the offices of the Federal Trade Commission, in the City of Washington, D. C., as the place, when and where a hearing will be had on the charges set forth in this complaint at which time any place you shall have the right, under said act, to appear and show cause why an order to cease and desist from the violation of the law charged in the complaint.

You are notified and required, within 30 days from service of the complaint, unless such time be extended by order of the Commission, to file with the Commissioner an answer to the complaint. After filing answer you will be given reasonable notice of the time set for hearing. The Rules of practice adopted by the Commission with respect to answers and failure to answer (Rule III) provide as follows:

(1) In case respondent shall desire to contest the proceeding such answer shall contain a short and simple statement of the facts which constitute the ground of defense. Respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state, such statement operating as a denial. Any allegation of the complaint not specifically denied in the answer unless respondent shall state in the answer that respondent is without knowledge, shall

be deemed to be admitted to be true and may be found by the Commission.

(2) In case respondent desires to waive hearing on the charges set forth in the complaint and not to contest the proceeding the answer may consist of a statement that respondent refrains from contesting the proceeding or that respondent consents that the Commission may make, enter and serve upon respondent an order to cease and desist from the violations of the law alleged in the complaint or that respondent admits all the allegations of the complaint to be true. Any such answer shall be deemed to be an admission of all the allegations of the complaint and to authorize the Commission to find such allegations to be true.

(3) Failure of the respondent to file answer within the time as above provided for shall be deemed to be an admission of all allegations of the complaint and to authorize the Commission to find them to be true and to waive hearing on the charges set forth in the complaint.

In Witness Whereof, the Federal Trade Commission has caused this complaint to be signed by its Secretary, and its official seal to be hereto affixed, at Washington, D. C., this 29th day of February, A. D., 1928.

By the Commission.

Otis B. Johnson,
Secretary.

(Seal)

ANSWER—Filed March 30, 1928.

The Answer of the Raladam Company, the above named respondent, to the Complaint of the Federal Trade Commission, the above named complainant, respectfully shows:

First: Respondent says that said complaint is defective and insufficient in point of law; that said com-

plaint fails to state facts sufficient in law to show that said complainant possessed lawful power and authority to issue and serve the said complaint, and that in truth and in fact complainant did not possess lawful power and authority to issue and serve the said complaint, and does not possess lawful power and authority to hear, or to issue any order on, said complaint, except an order of dismissal; that said complaint fails to state facts sufficient in law to show that respondent is using, or ever used, unfair methods of competition in commerce, within the meaning of the statute mentioned in the said complaint; and that said complaint is vague, uncertain, indefinite, and argumentative, and does not tender any definite, or certain, or material issue or issues of fact, and does not fairly or sufficiently apprise respondent of what issue or issues of fact will be tried at the hearing of the said complaint, or in respect of what issue or issues of fact respondent should obtain evidence in preparation of a hearing of said complaint.

Second: Respondent respectfully saves and reserves to itself, to be urged if and when this proceeding shall come before any court, all, and all manner of, exceptions and objections that can or might be taken to the power and authority of complainant in the premises, and that can or might be taken to the said complaint on account of the manifold defects and insufficiencies thereof.

Third. Answering the introductory paragraph of said complaint, respondent denies that complainant acted in the public interest, as is there alleged, and denies that, as is there charged, respondent has been or is using any unfair method or methods of competition in commerce in violation of the statute there mentioned.

Fourth. Answering "Paragraph One" of the said complaint, respondent admits the allegations thereof. Respondent further says that it was not incorporated until January, 1927.

Fifth. Answering "Paragraph Two" of the said complaint, respondent admits that it sells a medicinal preparation, in tablet form, for internal use by human beings, under the trade-name of Marmola Prescription Tablets. Respondent denies that, as is in said Paragraph Two charged, respondent commonly refers to said preparation as an "obesity cure," and denies that, as is there charged, respondent "alleges" that said preparation is useful and effective "in dissolving and removing excess flesh of the human body."

Respondent says that it does not allege, advertise, or otherwise hold out, that the said Marmola Prescription

Answer

Tablets are useful for "dissolving," or in any similar manner "removing," anything from the human body. Respondent says that what respondent alleges, advertises, and holds out in respect of said Tablets, appears from the label on the box in which said Tablets are sold to a consumer, and from the small pamphlet that is inserted in each said box, which said box and pamphlet are mentioned in "Paragraph Five" of the said complaint; and that the following excerpts from the label on the said box, and from the said pamphlet, show the gist of what respondent alleges, advertises, and holds out in respect of the said Marmola Prescription Tablets, to-wit:

"Marmola is recommended as a treatment for the reduction of excessive fat" (Label).

"We state here all of the ingredients of Marmola. We do this so that you may know just what you are taking, and your physician may know if you wish" (Pamph. p. 19).

"Formula
1 grain Extract Bladderwrack,
½ grain Extract Phytolacca,
¼ grain Extract Cascara Sagrada
Rx. 87 Spec.
½ grain Desiccated Thyroid,
¼ grain Phenolphthalein,
16/1000 min. Oleoresin Ginger,
Po. Saccharum special,
3 grains Calcium Carbonate Precipitated,
1/24 min. Methyl Salicylate,
1/24 min. Oil Anise,
1/24 min. Oil Sassafras,
Talc. Brown,
Ivory Black,
Aqua for Extracts,
Po. Burnt Umber,
Red Oxide of Iron,
Syrupus Simplex,
Lubricating Solution,
Aqua for Granulating,
Liquid Petroleum colorless."

"Take one tablet after each meal and at bedtime, with enough water to swallow easily" (Label; Pamph. p. 3).

"This treatment should be faithfully taken as directed, for 60 to 90 days in order to obtain the best results" (Label).

Answer

"The right rule is to take Marmola until you reach normality. A table in this pamphlet tells your proper weight" (Pamph. p. 15).

"Stop when you are satisfied; then if you start to gain again, take Marmola a while longer" (Pamph. p. 15).

"Try not to miss a dose, for the cumulative effects are important" (Pamph. p. 3).

"This dosage is not intended to lead to rapid reduction. It will rarely exceed 3 or 4 pounds a week" (Pamph. p. 3).

"The rate of reduction **differs with individuals. Habits** also affect it" (Pamph. p. 3).

"The time required **differs with conditions. Some people need little, some much**" (Pamph. p. 15).

"Physicians in treating obesity often prescribe much larger doses of the Marmola factors. That is to hasten effects" (Pamph. p. 4).

"But the concensus of opinion is that the dosage we direct, if taken regularly, seems to best fit the **average case**" (Pamph. p. 4).

"The study has been to adapt it (i. e. the prescription) to the **average case**" (Pamph. p. 19).

"It (i. e. the prescription) is based on the opinion that a moderate rate of reduction serves the purpose best" (Pamph. p. 19).

"**Consult your own physician** if you want special advice **in any unusual condition.** The Marmola prescription, **made for the multitudes,** considers the **average person** simply seeking to reduce. A physician, in extreme cases, might hurry the treatment. Or he might add certain factors. But that requires personal contact. If you desire more advice than we give in this book, get it from a man who can meet you. We do not prescribe in special cases by letter" (Pamph. pp. 21-22).

"If you are over-fat you probably have an underactive thyroid. Restoring that activity may mean much to you in other ways than fat reduction" (Pamph. pp. 5-6).

"Many people with deficient thyroids gain fat whatever they do. Some are very active, some are small eaters. Yet they suffer the deformity of fat. Many people with over-active thyroids stay thin, however much they eat or rest. The object of Marmola is to help establish a normal gland condition" (Pamph. pp. 11-12).

Answer

"The chief object of Marmola is to help correct thyroid deficiency. When that result shows in normal weight, it is well to stop Marmola" (Pamph. p. 15).

"You will probably find that the use of Marmola brings you new vim and vitality. That is because the thyroid influences other ductless glands. But our advisers do not recommend the taking of Marmola for that purpose after the weight becomes normal" (Pamph. pp. 15-16).

"Excess fat may be consumed by certain activities, particularly gland activities" (Pamph. pp. 10-11).

"The Marmola prescription contains desiccated thyroid taken from food animals. It is a concentrated food intended for weak thyroids, particularly when that weakness shows itself in obesity. The object is to restore a normal condition under which few people gain too much weight" (Pamph. p. 11).

"There is a time in starting Marmola when confidence is quite important. Gland conditions cannot be corrected over-night. Confidence should be based on the fact that Marmola contains the leading internal factor in fat reduction known to modern science. That factor is recognized the world over. No modern physician can reasonably dispute it. You have probably read articles by physicians in magazines, stating how an active thyroid affects fat" (Pamph. pp. 12-13).

"The chief purpose of Marmola is to feed and stimulate the thyroid gland, which controls the combustion of food in the body. It is also the main inspiration of other ductless glands. The object is to aid in turning more food into energy and heat and less into fat, thus restoring a natural condition" (Pamph. p. 5).

"The makers of Marmola do not advise abnormal exercise or diet * * * But there is no question that reasonable habits in these respects greatly aid results. **No matter how the thyroid may be stimulated and the combustion of foot increased it is possible to offset much of the benefit by too lazy habits and too much food.** Marmola is intended to **aid reduction** without radical, dangerous, or unpleasant methods. This **method** is scientific. It embodies the chief factors, if not the only factors, employed by modern physicians for the purpose intended. That is, for correcting a thyroid deficiency * * * But under-

exercise and over-feeding naturally retard results. They may in extreme cases counteract them * * * Avoid starches and sweets in excess * * * Cut down fatty foods * * * Chew all foods well, even your soups * * * At every meal eat a little less than you need" (Pamph. pp. 6-10).

"If the use of Marmola tends to reduce the desire for fat-forming foods, or even your appetite, it is probably because those foods, being more largely turned into energy and heat, satisfy one more quickly" (Pamph. p. 9).

"The Marmola prescription is based on years of work here and abroad by scientists in the field of glandular therapy. Reports of this research work show that results were first proved on thousands of test animals, then on human beings. Marmola itself has been proving them for 20 years to countless men and women. The results and the reasons for them are well understood in the scientific world today" (Pamph. p. 8).

"Marmola contains the leading internal factor in fat reduction known to modern science. That factor is recognized the world over. No modern physician can reasonably dispute it" (Pamph. p. 12).

"Millions of men and women in the past few years have escaped the deformities of fat. That fact is largely due to the factors in Marmola, either taken in this way or on physicians' perscriptions. This form of treatment is recognized by authorities the world over." (Pamph. p. 14).

"The main results are not direct, but they come through changing wrong conditions and tendencies" (Pamph. p. 5).

"It is found that many have the idea that Marmola does something to destroy fatty tissue. On that account, many people fear that it may be harmful. It might be if it did that, but it does not" (Pamph. p. 10).

Respondent says that in said pamphlet (pp. 25-26) are printed two tables, taken from the World Almanac and Encyclopedia for 1922, which tables show average weights of men and of women, respectively, of various heights and ages.

Sixth. Answering "Paragraph Three" of the said complaint, respondent admits that it offers for sale, and sells, the said Marmola Prescription Tablets, and causes

them to be transported in interstate commerce, from Detroit, Michigan, throughout the United States, and admits that said Tablets are purchased by persons who consume them.

Seventh. Answering "Paragraph Four" of the said complaint, respondent denies that it offers for sale, or sells, anything except said Marmola Prescription tablets and a laxative for use in connection with said Tablets, and denies that it offers for sale, or sells, said Marmola Prescription Tablets, or said laxative, in competition with the classes of persons, or any of them, in said Paragraph Four mentioned, and denies that it offers for sale, or sells, anything for "dissolving," or in any similar manner "removing," excess flesh.

Eighth. Answering "Paragraph Five" of the said complaint, respondent says that since January, 1927, but not theretofore, it has caused said Marmola Prescription Tablets to be advertised in, by, and through the advertising mediums mentioned in said paragraph. Respondent says that since said date, but not theretofore, it has packed, shipped, and delivered, with each small box of said Tablets, the pamphlet mentioned in said Paragraph Five, and respondent says that the purport of said pamphlet is as set forth hereinabove in subdivision "Fifth" of this answer. Respondent denies that it has ever published, or caused to be published, any advertisement of other or different purport than that of the said pamphlet, and denies that it ever published, or caused to be published, any advertisement except since January, 1927. Respondent says that said pamphlet contains the formula in accordance with which Tablets are prepared and that the several ingredients shown by said formula are contained in said Tablets. Respondent admits that one of said ingredients is desiccated thyroid, and admits that said ingredient is made from the thyroid gland of food animals, and admits that respondent's principal claim for the medicinal quality and virtue of said Tablets is based upon the fact that said Tablets contain said ingredient, and admits that said ingredient is claimed by respondent to possess value and effectiveness, to the extent that is asserted in and by said pamphlet, as hereinabove quoted, in the reduction of the fatty portions of the human body. Respondent denies that said desiccated thyroid is claimed by respondent to be of value and effectiveness, to any greater extent than that asserted in and by said pamphlet, in the reduction of the fatty portions of the human body. Respondent admits that desiccated thyroid is

popularly believed to be of value and effectiveness in the reduction of fatty portions of the human body.

Respondent admits that it is represented, in and by the pamphlet aforesaid, either directly or by implication, that said Marmola Prescription Tablets are prepared with scientific accuracy; and that it is there represented, also, that said Tablets are based on scientific research and knowledge, to the extent that it is there represented that said Tablets contain desiccated thyroid, and that thyroid is recognized by modern science, and by modern physicians, as the leading internal factor in fat reduction. And respondent says that said representations are true.

Respondent denies that it is represented by respondent in and by said pamphlet, or otherwise, as is charged by complainant, that said Tablets are unqualifiedly "safe, pleasant and effective in their action." Respondent says that, as more fully appears from the excerpts from said pamphlet set forth in the subdivision of this answer above numbered "Fifth," nothing more is represented, either directly or by implication, in and by said pamphlet in respect of the "action" of said Tablets, than that said Tablets are "made for the multitudes," and that if taken in the doses specified in said pamphlet, said Tablets are safe and effective in action for the "average person" and in the "average case."

Respondent denies that it is represented by respondent in and by said pamphlet, or otherwise, as is charged by complainant, that said Tablets may be used by purchasers absolutely and unqualifiedly "without discomfort, inconvenience, or danger of harmful results to the physical health of such users." Respondent says that, as more fully appears from the excerpts from said pamphlet set forth in the subdivision of this answer above numbered "Fifth," nothing more is represented, either directly or by implication, in and by said pamphlet than that said Tablets are "made for the multitudes," and that if taken in the doses specified in said pamphlet, said Tablets may be taken by the "average person," and in the "average case," without discomfort, inconvenience, or danger of harmful results to the physical health of the user.

Respondent denies that it is represented by respondent in and by said pamphlet, or otherwise, as is charged by complainant, that "Marmola is a scientific method for the treatment of obesity." Respondent says that, as more fully appears from the excerpts from said pamphlet set forth in the subdivision of this answer above num-

bered "Fifth," nothing more is represented, either directly or by implication, in and by said pamphlet than that the internal administration of desiccated thyroid, coupled with moderate exercise and moderate eating and with an avoidance of fat-forming food, is a scientific method of reducing flesh.

Respondent denies that it has made any representation in and by the said pamphlet, or otherwise, either directly or by implication, that scientific research has progressed to the point to which complainant in its said complaint charges that scientific research has not progressed. Respondent says that it is immaterial whether scientific research has, or has not, progressed to the point stated by complainant in its said complaint.

Respondent denies that it has made any representation in and by the said pamphlet, or otherwise, either directly or by implication, that Marmola Prescription Tablets contained an amount of thyroid, or of other ingredients in combination with thyroid, that would "act with a reasonable degree of uniformity upon the bodies of all users thereof." Respondent says that, on the contrary, as more fully appears from the excerpts from said pamphlet set forth in the subdivision of this answer above numbered "Fifth," it is expressly stated in said pamphlet that the action of said Tablets is not uniform as to all individuals, but that some people need little and some much, and that the rate of reduction differs with individuals.

Respondent denies that it has made any representation in and by said pamphlet, or otherwise, either directly or by implication, that Marmola Prescription Tablets contain an amount of thyroid, or of other ingredients in combination with thyroid, that would "be sufficient to be generally effective for the reduction of the excess flesh of the users thereof." Respondent says that, on the contrary, it is expressly stated in said pamphlet that Marmola Prescription Tablets were intended for use only by the "average person" and in the "average case," and that "Marmola is intended to aid reduction," and that "Marmola is to help establish a normal gland condition." And respondent further says that it is expressly stated in said pamphlet that persons taking Marmola internally should alto take moderate exercise, and should eat moderately, and should avoid fat-forming foods, and should chew their food well; and that it is there said that "No matter how the thyroid may be stimulated and the combustion of food increased, it is possible to offset much

of the benefit by too lazy habits and too much food"; and that it is there said "But under-exercise and overfeeding naturally retard results. They may, in extreme cases, counteract them."

Respondent denies that it has made any representation in and by said pamphlet, or otherwise, either directly or by implication, that Marmola Prescription Tablets could "safely be used by **any**," in the sense of every, "individual purchaser thereof, without previous consultation with a competent medical adviser and reliance upon his continuing observation and advice." Respondent avers that, on the contrary, it is expressly and repeatedly stated in said pamphlet that said Tablets were prepared for use by the "**average** person" and in the "**average** case," and is nowhere stated that said Tablets could be safely used by any and every individual indiscriminately, regardless of whether such individual was an "average," or other than an "average," person.

Respondent denies that it is the truth and the fact, and denies that all physicians are of the opinion, that thyroid, when introduced into the human body, is so powerful an agent that it is likely at all times, regardless of the quantity so introduced, to produce radical changes of conditions which will be harmful to the user thereof, and cannot be safely guarded against in any case except by the previous and continuing investigation, observation and advice of a competent physician. Respondent says that thyroid, in the form and amount and with the accompanying ingredients contained in Marmola Prescription Tablets, may be taken in the doses recommended in and by said pamphlet, by the "average person" and in the "average case," without producing any radical changes or conditions harmful to the user or requiring the services of a physician.

Respondent denies that it is the truth and the fact, and denies that all physicians are of the opinion, that the use of thyroid for the reduction of excess flesh, regardless of the form and amount of thyroid so used, is unqualifiedly fraught with possible injury, and unqualifiedly calls for constant professional observation, medical skill, and care. Respondent says that the use of thyroid, in the form and amount and with the accompanying ingredients contained in the Marmola Prescription Tablets, and in the doses recommended in and by said pamphlet, is not fraught with possible injury to the "average person" in the "average case," and does not call for

constant, or any, professional observation, medical skill, or care.

Respondent denies that it has made any representation in and by said pamphlet, or otherwise, that Marmola Prescription Tablets are for "use indiscriminately by all purchasers of said tablets." Respondent says that, on the contrary, it is expressly stated in and by said pamphlet that said Tablets are for use by the "average person" and in the "average case."

Respondent denies that said Marmola Prescription Tablets cannot be made harmless and safe for use, without other information, guidance, or advice than that supplied by respondent in the pamphlet aforesaid, by the class of persons for whom said Tablets are intended, namely "average persons," and not all persons indiscriminately, except by reducing the amount of thyroid in said Tablets so greatly as to render said Tablets ineffectual as a remedial agent. Respondent says that said Tablets may be safely used by the class of persons for whom said Tablets are intended, namely, "average persons" in "average cases," without other information, guidance, or advice than that supplied by respondent in the pamphlet aforesaid, and that there is sufficient thyroid in the said Tablets to be effectual as a remedial agent, to the extent to which said Tablets are advertised and held out by respondent to be effectual as a remedial agent, if the same be used by the "average person" in the "average case" in accordance with the information, guidance, and advice supplied by respondent as aforesaid.

Ninth. Answering "Paragraph Six" of the said complaint, respondent denies that any advertisement published by it contains anything which, when fairly construed, is calculated to mislead and deceive the purchasing public, as stated in said Paragraph Six.

Respondent admits that, as is charged in said complaint, there are many persons who are seeking some safe and dependable means whereby they may quickly and permanently rid their bodies of excess fat or of portions of the flesh which they now bear and of which they desire to be rid.

Respondent denies that complainant has any lawful power or authority to measure respondent's statements and representations by the standard selected by complainant, namely, the standard of whether respondent's statements and representations have "the tendency and capacity to mislead and deceive the purchasing public." Respondent says that such standard is an arbitrary,

capricious one, resting wholly within the keeping of the person who applies it and subject to variation at such person's whim, and the only standard by which respondent's statements and representations may lawfully be measured by complainant, or by anybody else, is whether if such statements and representations should be read with ordinary care and attention, by a person of ordinary intelligence reasonably familiar with the language in which such representations are made, such reader would, or would not, be reasonably likely to be mislead and deceived.

Respondent denies that it has made any statement or representation in and by said pamphlet, or otherwise, that if read with ordinary care and attention by a person of ordinary intelligence reasonably familiar with the language in which such representations are made, would be reasonably likely to mislead or deceive such person into the belief that Marmola Prescription Tablets, as a remedial agent for the reduction of excess fat or other flesh constituted by themselves, and independently of dieting and exercise, a scientific method, or any other kind of method, of treatment; or into the belief that said Tablets, even if accompanied by dieting and exercise, constituted a "scientifically accurate" method of treatment, or anything more than a method of treatment adequate to the "average case" of the "average person"; or into the belief that said Tablets were uniquely and particularly the result of many years of scientific research, or that anything was the result of many years of scientific research except that the internal administration of desiccated thyroid, accompanied by dieting and exercise, would tend to reduce excess fat; or into the belief that said Tablets were a safe, effective, and dependable remedy that might be used by "any and all purchasers thereof," or by any purchasers thereof other than "average persons" in "average cases" without inconvenience, sacrifice, or danger of harmful results to physical health.

Tenth. Answering "Paragraph Seven" of the said complaint, respondent denies that the acts and practices of respondent are prejudicial to the public or to the competitors of respondent, in the sense that respondent's acts and practices constitute unfair methods of competition in commerce, and respondent says that complainant has no lawful power or authority to consider, or to express any view upon, whether respondent's acts and practices are prejudicial in any other sense.

Answer

Eleventh. Further answering, respondent says that the several matters in respect of which complainant, in its said complaint, has charged respondent with having made false representations, as in said complaint set forth, are each and all matters of opinion, and not matters of fact; that the expression by respondent of its opinion in respect of said matters, even though such expression were ill founded and unsound, and contrary to the opinion of some or all other persons, cannot and does not constitute an unfair method of competition within the operation of the statute mentioned in said complaint; and that complainant has no lawful power or authority to consider, or to express any view upon, whether any expression by respondent in respect of any matter of opinion is sound or unsound, false or true.

Wherefore respondent prays that the said complaint may be dismissed.

Raladam Company,
By Adene Moss,
Its President.

Address:
2-234 General Motors Bldg.
Detroit, Michigan.

R. M. Connoy,
560 Equity Bldg.,
Detroit, Michigan,
Stevens or Beetzel Eaman & Long.
Leurs W. McCandless,
Attorneys for Respondent.
Address: 2233 First National Bank Bldg.
Detroit, Michigan.

14/EH/1

UNITED STATES OF AMERICA

Before Federal Trade Commission

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 2nd day of June, A. D., 1928.

Present:

William E. Humphrey,
Abram F. Myers,
Edgar A. McCulloch,
Garland S. Ferguson, Jr.
C. W. Hunt.
} Commissioners.

In the Matter of,
Raladam Company.
} Docket No. 1496.

ORDER APPOINTING EXAMINER AND FIXING TIME AND PLACE FOR TAKING TESTIMONY.

This matter being at issue and ready for the taking of testimony.

It Is Ordered that Edward M. Averill, an examiner of this Commission, be and he is hereby designated and appointed to take testimony and receive evidence in this proceeding and to perform all other duties authorized by law.

It Is Further Ordered that the taking of testimony in this proceeding begin on Tuesday, June 26, 1928, at 10 A. M., 2246 Transportation Building, 608 South Dearborn St., Chicago, Ill.

Upon completion of testimony for the Federal Trade Commission, the Examiner is directed to proceed immediately to take testimony and evidence on behalf of the respondent. The Examiner will then close the case and make his report.

By the Commission:

Otis B. Johnson,
Secretary.

(Seal)

UNITED STATES OF AMERICA

Before Federal Trade Commission

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 13th day of April, A. D., 1929.

Commissioners:

Edgar A. McCulloch, Chairman,
Garland S. Ferguson, Jr.,
C. W. Hunt,
William E. Humphrey,
Charles H. March.

In the Matter of, Raladam Company. } Docket No. 1496.

FINDINGS AS TO THE FACTS AND CONCLUSION.

Pursuant to the provisions of an Act of Congress, approved September 26, 1914, the Federal Trade Commission issued and served a complaint upon the respondent, Raladam Company, charging it with the use of unfair methods of competition in commerce in violation of the provisions of Section 5 of said Act.

Respondent having entered its appearance and filed its answer to said complaint, hearings were had before a Trial Examiner theretofore duly appointed and testimony was heard and evidence received in support of the charges stated in the complaint and in opposition thereto. Thereafter this proceeding came on regularly for decision and the Commission having duly considered the record and being now fully advised in the premises makes this its report stating its findings as to the facts and conclusions drawn therefrom.

Paragraph One: Respondent, Raladam Company, is a corporation organized and existing under and by virtue of the laws of the State of Michigan, having been incorporated in January, 1927, and maintains its office and principal place of business in the City of Detroit, State of Michigan.

Paragraph Two: Respondent is engaged in the sale of an alleged obesity cure, or remedy, which it has named Marmola and which it sells under the trade name, Marmola Prescription Tablets. The retail price of Marmola is $1.00 per box. Respondent does an annual business in the sale of Marmola of $600,000. Marmola is manufactured for respondent by Parke, Davis & Co., of Detroit,

under a formula furnished and owned by the respondent. It is put up in tablet form and is for use by human beings, the same being taken into the mouth and swallowed.

Paragraph Three: The respondent offers for sale and sells Marmola Prescription Tablets to wholesale druggists and jobbers in every state of the United States, and such wholesale druggists or jobbers resell the same to retail druggists located in the various states of the United States, who in turn resell the same to the consumers or purchasers thereof. The respondent causes the said Marmola Prescription Tablets to be transported from the City of Detroit in thhe State of Michigan, into and through other states of the United States to the purchasers thereof at their respective points of location or places of business.

Paragraph Four: The respondent in the course and conduct of its business aforesaid, is in competition with other persons, partnerships or corporations in and throughout the several States of the United States, who are likewise engaged in offering for sale and selling printed professional advice, books of information and instruction, and other methods, means, remedies and appliances for dissolving or otherwise removing excess flesh of the human body.

Paragraph Five: Respondent in the course and conduct of its business causes its Marmola Prescription Tablets to be put up in a cardboard container upon which said container appear the words, "Marmola is recommended as a treatment for the reduction of excessive fat," and among other words and figures upon said container appear under the heading, "Directions," the following:

> "Take one tablet after each meal and at bed time with enough water to swallow easily. If preferred, tablet may be broken into pieces before taken. This treatment should be faithfully taken as directed from 60 to 90 days in order to obtain the best results."

Enclosed in the package in which Marmola Prescription Tablets reach the consuming public is the formula from which Marmola is made. Among the ingredients of Marmola are thyroid and three powerful laxatives called phenolphthalein, cascara sagrada and phytolacca. Each tablet contains ½ grain of thyroid. If one follows the directions contained inside and outside the package he will consume two grains of thyroid per day. Respondent's principal claim for the medicinal

quality and virtue of Marmola is based on the fact that said tablets contain said thyroid, which ingredients is made from the thyroid gland of food animals and is claimed by respondent and popularly believed to be of great value and effectiveness in the reduction of the fatty portions of the human body.

Paragraph Six: Respondent in the aid of selling said Marmola causes the same to be advertised in newspapers, magazines, periodicals and other publications of general circulation in the United States and the several states thereof, and in printed matter upon labels attached to or in circulars wrapped about or folded within the box in which such tablets are finally packed, and in printed matter attached to cartons or other containers used in packing and shipping same to purchasers.

In the aforesaid advertisements the respondent causes to be set forth the following representations:

1. That the preparation of said Marmola is the result of, and is based upon, scientific research, knowledge and accuracy;

2. That its medical properties are safe, pleasant and effective in their action in the removal of excess flesh from the body;

3. That the same may be used by purchasers thereof without discomfort, inconvenience or danger of harmful results to the physical health of the users of such compound;

4. That the said Marmola is a scientific method for the treatment of obesity and is based on many years of scientific research in the United States of America and in foreign lands.

Paragraph Seven: Each and all of the representations mentioned in Paragraph Six hereof are false and misleading in—

1. That the preparation of said Marmola is not the result of, nor is it based upon scientific research, knowledge or accuracy;

2. Its medical properties are not safe, pleasant and effective in their action in the removal of excess flesh from the human body unless administered under the direction of a competent medical adviser.

3. The same may not be used by purchasers thereof without discomfort, inconvenience or danger of harmful results unless administered under the direction of a competent medical adviser.

4. Marmola is not a scientific method for the treatment of obesity and is not based on many years of scien-

tific research in the United States of America and in foreign lands, or upon any scientific research;

5. Marmola will not act with uniformity upon the bodies of all users thereof;

6. Marmola will not be generally effective for the reduction of the excess flesh of the users thereof without imperiling the health of a substantial number of such users;

7. Marmola may not be safely used by any purchaser thereof without previous consultation with a competent medical advisor and under his continuing observation and advice;

8. The thyroid in Marmola when introduced into the human body is a powerful agent liable at all times to produce radical changes of conditions that will be harmful to the users thereof;

9. Such harmful changes may be safely guarded against in any case where Marmola is taken only by the previous and continuing investigation, observation and advice of a competent physician;

10. The use of said Marmola Tablets for the purpose of reducing or removing excess flesh, without further information, guidance or advice than is furnished by respondent, is liable to have an injurious effect upon the person so using it.

11. The use of Marmola as directed, i. e., 4 tablets a day for a period of 60 to 90 days would be likely to create in the user thereof what is known in medical science as the "laxative habit."

Paragraph Eight: In and throughout the several states of the United States are many persons who are seeking some safe and dependable means whereby they may quickly and permanently rid their bodies of excess fat or portions of the flesh which they now bear and of which they desire to be rid. Said statements and representations made by respondent in said containers, directions, advertisements, labels, pamphlets and other printed matter as described in Paragraphs Five and Six hereof, have the tendency and capacity to mislead and deceive the purchasing public into the belief that said Marmola as such remedial agency for the reduction of excess fat or other flesh is a scientific and accurate method of treatment; is the result of many years of scientific research in the United States and foreign countries; is a safe, effective and dependable remedy that may be used by any and all purchasers thereof without inconvenience, sacrifice or danger of harmful results to physical health,

and have the capacity and tendency to induce users thereof to purchase same in such belief.

CONCLUSIONS.

The practice of said respondent under the conditions and circumstances described in the foregoing findings are to the prejudice of the public and respondent's competitors and are unfair methods of competition in commerce and constitute a violation of an Act of Congress, approved September 26, 1914, entitled, "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes."

By the Commission:

(Seal)

Edgar A. McCulloch,
Chairman.

Dated this 13th day of April, A. D., 1929.

Attest:

Otis B. Johnson,
Secretary.

UNITED STATES OF AMERICA

Before Federal Trade Commission

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 13th day of April, A. D., 1929.

Commissioners:

Edgar A. McCulloch, Chairman,
Garland S. Ferguson, Jr.,
C. W. Hunt,
William E. Humphrey,
Charles H. March.

In the Matter of, Raladam Company. } Docket No. 1496.

ORDER TO CEASE AND DESIST.

This proceeding having been heard by the Federal Trade Commission on the complaint of the Commission, the answer of respondent thereto, the testimony, evidence, briefs and argument of counsel, and the Commission having made its findings as to the facts and its conclusions that respondent has been and is now using unfair methods of competition in commerce in violation of the provisions of Section 5 of an Act of Congress, approved September 26, 1914, entitled, "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes."

It Is Now Ordered, that respondent Raladam Company, its officers, agents representatives and employees, in connection with the advertising, offering for sale and sale in commerce among the several states of the United States of the product "Marmola," do cease and desist from directly or indirectly:

1. Representing that "Marmola" is a scientific and accurate method for treating obesity;
2. Representing that the formula from which "Marmola" is made is a scientific formula;
3. Representing that "Marmola" is the result of scientific research;
4. Representing that "Marmola" can be taken without the advice and direction of competent medical authority as a safe and harmless remedy in the treatment of obesity;
5. Representing that "Marmola" can be taken

with no harmful result to physical health without the advice and direction of competent medical authority.

6. From representing "Marmola" as a remedy for the treatment of obesity unless such representation is accompanied by a statement that "Marmola" cannot be taken with safety to physical health except under the direction and advice of competent medical authority.

It Is Further Ordered, that the respondent, Raladam Company, shall, within sixty (60) days after service upon it of a copy of this order file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist hereinabove set forth.

By the Commission.

(Seal)

Otis B. Johnson,
Secretary.

STIPULATION—Received Aug. 6, 1929.

It Is Hereby Stipulated And Agreed by and between the Federal Trade Commission and the Respondent, Raladam Company, through their respective counsel, that the stenographic record of the proceedings before the Commission may be corrected in the following particulars, viz:

1. On page 89 of the transcript in line 9 from the bottom of the page, change the word "fraud" to the word "fraught."
2. On page 340 in line fourteen take out the words "glands of" and insert the word "gland" between the word "internal" and the word "deficiencies" and also insert the words "diseases of" after the

word "deficiencies" so that the sentence will read "thyroid diseases, internal gland deficiencies, diseases of glands of internal secretion."

3. On page 381 change the second answer so as to read as follows: "A. If that patient has been developing any nervousness or tendency to sweat unusually or if he finds any excessive action or over-action on the part of the heart or heart consciousness, I think that individual would consider that that is different or out of line."
4. On page 385 of the transcript change the fifth answer to read as ollows:—"A. It would then depend a great deal on—you mean in hyper-thyroidism complicated with diabetes, or hyper-thyroidism by itself?"
5. On page 396 in the fifth line from the top of said page change the word "answer" to the word "diet."
6. On page 397 of the transcript in the first line on said page indicate that the words "I do not know, etc." is the beginning of an answer by the witness.
7. On page 407 in the fourth line from the top of the page insert the word "produced" after the word "continuously."
8. On page 410 in the tenth line from the bottom of the page change the word "exogenous" to the word "indogenous."
9. On page 414 in the twelfth line from the top of the page change the word "hypothyroidism" to the word "hyperthyroidism."
10. On page 414 in the thirteenth line from the top of the page change the word "hypothyroidism" to the word "hyperthyroidism."
11. On page 415 in the tenth line from the top of the page change the word "hypothyroidism" to the word "hyperthyroidism."
12. On page 415 in the twelfth, thirteenth, sixteenth and twenty-fourth lines change the word "hypothyroidism" to the word "hyperthyroidism."
13. On page 423 in the first line change the word "hypothyroidism" to the word "hyperthyroidism."
14. On page 423 in the fourth, seventh and seventeenth lines change the word "hypothyroidism" to the word "hyperthyroidism."
15. On page 438 in the third line from the bottom make

the answer read "A. I don't believe it would."

16. On page 476 in the fourth line correctly spell the word "synergistic."
17. On page 480 in the eleventh line change the word "anti-toxin" to the word "anti-toxins."
18. On page 480 in the twelfth line change the words "manufacturers of" to the words "manufactured in."
19. On page 512 in the eighth line from the bottom insert the word "in" between the words "poisonous" and "amounts."
20. On page 514 in the tenth line correctly spell the word "alimentary."
21. On page 515 in the second line correctly spell the word "proteins."
22. On page 519 in the ninth line from the bottom of the page change the word "credit" to the word "cretin."
23. On page 525 in the tenth line from the bottom of the page insert article "a" between the words "not" and "good."
24. On page 543 in the last line on said page change the word "pounds" to the word "points."
25. On page 544 in the second line from the top change the word "pounds" to the word "points."
26. On page 544 in the third line from the bottom change the word "hypothyroidism" to the word "hyperthyroidism."
27. On page 544 in the second line from the bottom change the word "hypothyroidism" to the word "hyperthyroidism."
28. On page 548 in the second line from the bottom change the word "hyper" to the word "hypo," and also change the word "hypo" to the word "hyper" so that the sentence will read, "hypo is under and hyper is over."
29. On page 549 in the tenth line change the words "have to" to the word "hardly."
30. On page 15 in the eighteenth line, strike the words "what it manufactured or where it was" so that the question will read "how was the product sold by the Marmola Company, and marketed and sold?"
31. On page 16, line 6, strike out the letters H. T. E. as they appear between the words "Company" and "in."
32. On page 17, line 12, strike out the word "by" and substitute the word "in."

Stipulation

33. On page 71, line 2, add the letters "de" before the word "generation" so that the word will be "degeneration."
34. On page 138, second line from the bottom of the page, add the letter "y" to the word "an" so that the question will read, "Have you taken any post graduate work?"
35. On page 165, line 9, add the word "take" between the words "may" and "the," so that the sentence will read "You may take the witness."
36. On page 185, line 7 from the bottom of the page, add the word "the" after the word "with."
37. On page 194, first line, substitute the word "causes" for the word "caused."
38. On page 239, line 7, add the word "more" before the word "powerful."
39. On page 240, second line from the bottom of the page, strike out the words "the make" and substitute the word "eunuchism" so that the sentence will read, "in the case of eunuchism it is well known that eunuchism usually breeds heavy, pudgy, mostly inactive people, though not always."
40. On page 245, line 9, between the word "have" and the word "afflictions" add the word "people," and make the word "afflictions" read "afflicted"; and in the tenth line strike out the words "such as" and substitute therefor the word "with"; and in the same line between the words "and" and "do" add the word "who" so that the question will read, "Is it not a fact that among the laity we have people afflicted with heart lesions and kidney trouble and who do not know it?"
41. On page 315, line 8, change the word "hypothyroidism" to read "hyperthyroidism."
42. On page 339, line 6, substitute the name of Robert E. Cantwell for the name of E. J. Hornibrook.
43. On page 375, line 8, after the word "question" strike out the words "by a" and substitute the words "and put another question" so that the sentence will read "I will withdraw that question and put another question."
44. On page 376, the sixth line from the bottom of the page, strike out the word "is" and substitute the word "has."
45. On page 378, in the ninth line between the words "you" and "prescribe" add the words "did not"

so that the question will read, "Haven't you had in your practice, Doctor, obese patients come to you for whom you did not prescribe thyroid?"

46. On page 383, the third line from the bottom, strike out the word "face" and substitute the word "case."
47. On page 387, line 12, between the word "to" and the word "increase" add the word "an."
48. On page 397, second line from the bottom, strike out the word "portion" and substitute the word "person."
49. On page 424, line 11, strike out the word "the."
50. On page 428, in the last line, strike out the word "to" and substitute the word "can."
51. On page 431, line 11, strike out the word "than" where it appears between the words "more" and "proteins."
52. On page 433, third line, strike out the word "susceptive" and substitute the word "defective," so that the question will read, "Is it not true as a general proposition that a person who has defective thyroid glands can take more of the thyroid remedy than those whose thyroid glands are normal?"
53. On page 464, line 7, strike out the words "who took it."

Adrien F. Busick,
Attorney for Federal Trade Commission.
Stevenson, Butzel, Eamon & Long,
Attorneys for Respondent.

Dated: Detroit, Michigan,
this 26th day of July, A. D. 1929.

Chicago, July 24, 1928.

Met pursuant to notice, 10:00 o'clock A. M.

Before:

Edward M. Averill, Examiner.

Appearances:

Edward J. Hornibrook (Washington, D. C.) for the Federal Trade Commission.

Rockwell T. Gust, 2214 First National Bank Building, Detroit, Michigan; R. M. Connor, 560 Equity Building, Detroit, Michigan; Robert E. Cantwell, Jr. 1105 Hartford Building, Chicago, Illinois, attorneys for the Respondent.

PROCEEDINGS.

Examiner Averill: All right Mr. Hornibrook, we are ready to hear your first witness.

Mr. Hornibrook: I will call Mr. Hayes.

EDWARD D. HAYES, was thereupon called as a witness and having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Hornibrook:

Q. Where do you live, Mr. Hayes?

A. Detroit.

Examiner Averill: Where?

A. Detroit, Michigan.

By Mr. Hornibrook:

Q. How long have you lived there?

A. Thirty years.

Q. Do you hold any office in the Respondent Company, the Raladam Company?

A. Yes, sir.

Q. What office is that?

A. General Manager.

Q. Is that a corporation?

A. It is.

Q. Incorporated under what laws?

A. Michigan.

Q. Do you have with you the articles of incorporation? (Inc. Jan. 19, 1927.)

A. Yes.

Mr. Hornibrook: I will ask that that be marked for identification.

Examiner Averill: The same is marked, Commissioner's Exhibit 1, for identification.

(The document was thereupon marked Commissioner's Exhibit No. 1, for identification.)

By Mr. Hornibrook:

Q. What is Commissioner's Exhibit 1 for identification, Mr. Hayes?

A. Sir?

Edward D. Hayes

Examiner Averill: He asked you what it was.

The Witness: The articles of association of the Raladam Company.

By Mr. Hornibrook:

Q. A copy of the articles, are they not?
A. Yes.

Mr. Hornibrook: We offer those in evidence.
Examiner Averill: Any objection, gentlemen.
Mr. Gust: No objection.
Mr. Connor: No objection.
Examiner Averill: The papers in question will be received and marked Commissioner's Exhibit No. 1.

(The document was thereupon received in evidence and marked Commissioner's Exhibit No. 1.)

By Mr. Hornibrook:

Q. What is the capital stock of the Raladam Company?
A. One hundred shares, no par stock. No par stock.
Q. Who are the officers and directors of the Company?
A. This is the original ones.
Q. I am asking for the present ones.
A. All right. The present ones are Miss Moss.
Q. And she holds what office?
A. President. Miss Hannon, Secretary and Treasurer. Miss Hayes, Vice President.
Q. Who is Miss Hayes?
A. She is my sister.
Q. Proceed, please.
A. What?
Q. Proceed to go ahead. Proceed, go ahead with the names.
A. That is all.
Q. Have you given now the officers and the directors too?
A. Yes, sir.
Q. And you are the General Manager of the Company?
A. Yes.
Q. And have you been so since its organization?
A. Yes.
Q. What is the volume of its business per year?

A. Well, that varies considerably.

Q. What has it been in the last two years, say?

A. About six hundred thousand, maybe.

Q. A year?

A. A year. Before that about seven. That is gross business.

Q. Now, what does the Raladam Company make, if anything, and sell? What is its business?

A. They do not make anything.

Q. What is its business?

A. Selling, marketing Marmola Prescription Tablets, and Dilaxin Tablets.

Q. What are Marmola Prescription Tablets?

A. They are a treatment for obesity.

Q. What is the other that you spoke of?

A. Dilaxin.

Q. That is a laxative, is it?

A. That is a laxative, yes.

Q. Who makes Marmola?

A. Parke Davis & Company.

Q. Under whose direction?

A. Now, I could not tell you. I do not know.

Q. Who does it make it for?

A. They make it for us.

Q. Do you have a contract with Parke Davis?

A. Yes.

Q. Do they have that contract with you?

A. No.

Q. Can you give us what the contract is?

A. I would not want to attempt to do that by memory.

Q. Do they make it under a formula furnished them by you?

A. Yes.

Q. Do you have with you some sample packages of Marmola?

Mr. Cantwell: I think I brought one down here, if you want that.

The Witness: They wanted two. I have got them. I left them over at the hotel.

Mr. Cantwell: Here you are with one.

Mr. Hornibrook: I will ask that this be marked for identification.

Mr. Connor: Exhibit 2, is that it?

Examiner Averill: Yes, that will be Commission's Exhibit 2, for identification.

Edward D. Hayes

(The box was thereupon marked Commission's Exhibit No. 2, for identification.)

By Mr. Hornibrook:

Q. What is Commission's Exhibit No. 2 marked for identification?

A. It is a package of Marmola Prescription Tablets.

Q. Is that put up by Parke Davis & Company of Detroit?

A. Yes.

Q. At the instance and direction of the Raladam Company?

A. Yes. We order them. We give them the orders for it.

Q. Who designed the box?

A. They did.

Q. How is Marmola marketed and sold?

A. Through the wholesale and jobbing drug trade and to the retailer.

Q. Do you solicit the retail and jobbing and wholesale drug trade for Marmola?

A. Well, we never do any soliciting. We do not need that. That is we have no—we never call on the jobbing trade. We never call on the retail trade. We never write them soliciting business or orders from them. They come to us.

Q. They come to the Raladam Company at Detroit?

A. Yes.

Q. Now, when an order comes from a retail druggist or a wholesale or a jobbing druggist to the Raladam Company at Detroit, what do you do?

A. Ship it by Express.

Q. After the product is manufactured by Parke Davis Company, is it delivered to you by that company?

A. It is, like that, yes.

Q. And you carry it in stock there in Detroit?

A. Yes.

Q. Then when an order comes for Marmola from these druggists you ship it to them from Detroit?

A. Yes.

Q. Where are these druggists and jobbers and wholesale druggists located?

A. Well, practically all over the United States and Canada; other countries.

Edward D. Hayes

Mr. Hornibrook: I offer that in evidence.

Examiner Averill: Any objection, gentlemen.

Mr. Connor: No objection.

Examiner Averill: The package in question is received in evidence and marked Commission's Exhibit No. 2.

(The package was thereupon received in evidence and marked Commission's Exhibit No. 2.)

Mr. Hornibrook: I would like to open it and add to that exhibit, perhaps an A and B. I think there is a formula in there that I want to introduce.

Mr. Gust: There are two.

Mr. Hornibrook: If I had had another package here I would do that with the other one.

The Witness: You told me in that subpoena you wanted the formula so I brought a couple of copies of it here.

Mr. Cantwell: Why don't you divide that up into Commission's Exhibits 1, 2 and 3?

Mr. Hornibrook: I am going to.

Mr. Cantwell: And make each one—

Mr. Hornibrook: I wanted it all in this exhibit and marked A, B, and C.

Examiner Averill: Let me see that. There is a paper in there of some sort, so it says. That and this. Off the record just a moment.

(Discussion outside the record.)

By Mr. Hornibrook:

Q. I will ask the witness to open the package, Commission's Exhibit 2 and state what it contains?

A. You have not got all the package here. You handed me a package but the booklet is not in here.

Q. You haven't it all here?

A. No, the booklet is not there.

Examiner Averill: That is not what he wanted.

Mr. Cantwell: It ought to be there.

The Witness: But it is not.

Mr. Hornibrook: I guess somebody better get one.

Mr. Gust: Better get the one he brought from the hotel, I take it, or get one from some other source.

Mr. Connor: That is a defective package.

Mr. Hornibrook: Yes.

The Witness: The booklet is not in there. They took the booklet out of here.

Edward D. Hayes

Mr. Connor: A very important part of it.

The Witness: You have gotten those booklets.

Mr. Connor: Have you got any booklets with you?

Mr. Cantwell: Not with me.

The Witness: I tell you what you can do. You wanted two packages, anyway, didn't you?

Mr. Hornibrook: I wanted one to go in as an exhibit and I wanted one, another one to identify as an exhibit and have you identify what was in it.

Mr. Connor: We will send down and get it.

Mr. Hornibrook: There is a drug store down stairs.

Mr. Connor: Is that an up to date package?

Examiner Averill: That is the little booklet you speak of?

Mr. Connor: We can get one.

The Witness: I suppose if you wanted it taken out of the package.

Mr. Hornibrook: Off the record.

(Discussion outside the record.)

By Mr. Hornibrook:

Q. I will ask you to open Commission's Exhibit No. 2 and state what that contains?

A. I do not want to state that this is the book that is being used now.

Q. Then we better wait until we get some?

A. Because I cannot tell.

Mr. Hornibrook: Under the circumstances I believe that counsel better withdraw the exhibit?

Mr. Gust: And substitute the other one?

Mr. Hornibrook: Yes.

The Witness: Better have it up here. I do not know for sure. I do not know whether it is the same.

Mr. Cantwell: I do not recognize it as being the same.

Mr. Hornibrook: Mr. Examiner, with the consent of counsel and if it is agreeable to you we will withdraw Commission's Exhibit No. 2 and substitute another exhibit for it a little later on.

Examiner Averill: All right, gentlemen, we will just wait until we get the other box and then we will substitute it for the other one, but I think if we have other matters not connected with this exhibit that you wish to examine Mr. Hayes upon, you may do so,

and then when the other comes we can take it up at that time.

Mr. Hornibrook: I would rather put that in at this particular time.

Mr. Gust: We won't be but a minute getting it.

Examiner Averill: Off the record.

(Discussion off the record.)

By Mr. Hornibrook:

Q. Mr. Hayes, when was the Raladam Company incorporated?

A. January 19—whatever it is on there. Let me see it.

Mr. Connor: You will find it on the last page.

The Witness: The last page?

Mr. Connor: Yes.

The Witness: January 19, 1927.

By Mr. Hornibrook:

Q. And what is its principal place of business?

A. Detroit, Mich.

Q. Give the address please?

A. 232-234 General Motors Building.

Examiner Averill: Off the record.

(Discussion outside the record.)

By Mr. Hornibrook:

Q. How long has Parke Davis been making Marmola for the Raladam Company?

A. Ever since its organization.

Q. Ever since its organization?

A. Yes.

Q. How long has Marmola been manufactured and placed upon the market for sale?

A. Some day in August, 1907.

Q. 1907?

A. Yes.

Q. By what concern was it then manufactured and sold?

A. The Marmola Company. They sold it. They did not make it.

Q. Who made it then?

A. Originally, the first?

Q. Yes.

A. The Ray Chemical Company.

Q. Of where?

A. Detroit.

Q. And how long did they make it?

A. I could not tell you. For a few years.

Q. And then after that who made it?

A. It was made by a concern in Buffalo. Maybe you know the name of it. Suppose you leave that blank and I will think of the name in a few minutes.

Q. Some drug manufacturing concern in Buffalo, N. Y?

A. Yes. The Arnor Company. That is the name of it.

Q. Then who made it after that?

A. After that it was made by—what is that concern we have on Jefferson Avenue, the other big one?

Mr. Gust: Frederick Stearns?

The Witness: Frederick Stearns.

By Mr. Hornibrook:

Q. Of Detroit?

A. Of Detroit.

Q. And after that who made it?

A. Parke Davis.

Q. And Parke Davis began to manufacture it at what time?

A. I do not know. Probably twelve or fifteen years ago. Something like that. I cannot—

Q. Fifteen years ago?

A. Those dates may be—

Q. During that time, up until the time the Raladam Company was organized, it was made by these various manufacturing concerns for the Marmola Company?

A. Yes, sir.

Q. And the Marmola Company was a Michigan Corporation?

A. It was.

Q. What its principal place of business where?

A. Detroit.

Q. And what connection did you have with the Marmola Company?

A. I was the President of it.

Q. You organized it?

A. Yes. Helped to organize it, with Mr. Ray.

Q. I did not get that answer.

A. I helped to organize it with Mr. Ray of the Ray Chemical Company.

Q. Of the Ray Chemical Company of Detroit?

A. Yes.

Q. How was the product sold by the Marmola Company, and marketed and sold?

A. Well, they done a mail order business as well as this trade—what we call trade business.

Q. Up until what time?

A. Up until this concern was organized.

Q. And that was January, 1927?

A. Yes.

Q. Why did the Marmola Company cease to do a mail order business?

A. The Marmola Company never did cease to do a mail order business as long as it existed. The Marmola Company did not go out of business until some time in the summer—no, around the first of April, 1927.

Q. Is it not a fact that the Marmola Company in the year 1926 was cited by the Postal authorities to show cause why a fraud order should not issue against them?

A. Yes.

Q. What?

A. Yes, sir.

Q. And hearings were had under that citation, were they not in Washington, D. C.

A. Yes, sir.

Q. And do you recall when those hearings were?

A. Sometime in January, 1927, I think. It might have been the first of February or the early part of February, I cannot recall the exact date.

Q. A fraud order was not issued in those proceedings, was it?

A. No, sir.

Mr. Gust: If the Court please I object to going into the proceedings taken before the Post Office Department, as being a collateral issue. If we must litigate the propriety of those proceedings and our position in those proceedings, it is introducing a very substantial number of collateral issues in this proceeding which are not pertinent to the issues.

Examiner Averill: At this stage, unless some foundation was laid, I think I should have to sustain the objection, at this present state in the proceedings. The testimony as I understand it, so far as these proceedings, referred to as the proceedings by the Post Office Department are concerned, is against another legal entity and not against the Respondent in the instant case, and I do not see that so far a founda-

tion has been laid for it. Now, it may be as the case progresses the foundation may be laid, and it may be then become competent but it does not strike me at the present time that it is.

Mr. Hornibrook: My purpose in showing this, by this witness, if your Honor please, is that this was a continuous affair, practically one succeeding the other, yet practically the same entity. I have already shown, if you recall, that Marmola was on the market for nineteen years by the Marmola Corporation of which Mr. Hayes was a President, and I now propose to show by this witness that in order to avoid a fraud order they agreed to cease the manufacture of the Marmola and immediately signed an affidavit in which they entered into certain agreements, and immediately through the instrumentalities of Mr. Hayes, the Raladam Company was incorporated and carried on the same business.

Examiner Averill: Now, do show that wouldn't it first be necessary to show that the present Respondent, the Raladam Company, has done the things which are charged in this complaint? Having laid that foundation then it might become relevant to show that the same people, if they are the same people, have prior to the organization of the present Respondent Company carried on a business with the same remedy and as part of the proof that the preparation or the advertising of the preparation is false and misleading, it might then be competent to go into it and show that it was the same preparation and what action had been taken, if any action was taken, in connection with the preparation itself. The articles of incorporation so far introduced state "The present Respondent is incorporated for the purpose of manufacture and purchase of drugs, chemicals and pharmaceutical preparations and the sale of the same, whether at wholesale or retail, but exclusive of the same, whether at wholesale or retail, but exclusive of any mail order business, so called."

Mr. Hornibrook: Now, the proof might be a little bit out of order, your Honor, but I would like to make it as I go along now. I am somewhat disconcerted by the failure to produce the proper package and am perhaps a little ahead of myself. If I do not connect it up, it of course may go out. I would ask that I be permitted to proceed along these lines.

Mr. Gust: If the Court please, of course the issue

in any hearing—here is the package. Maybe that will relieve your embarrassment.

Mr. Hornibrook: There are three of them. I do not want quite that many. I will ask these be marked.

The Witness: Better throw that out altogether.

Mr. Connor: Throw it over here.

Examiner Averill: I will give it back to you gentlemen.

Mr. Gust: Give it back to the man who had it.

Mr. Hornibrook: I would ask that they be marked Commission's Exhibits 2 and 3 for identification.

Examiner Averill: Gentlemen, the two packages that are presented, which appear to be identical, one of them I have marked, as requested, Commission's Exhibit 2, for identification. The other one I have marked Commission's Exhibit 3, for identification.

(The packages were thereupon marked Commission's Exhibits numbers 2 and 3 respectively, for identification.)

By Mr. Hornibrook:

Q. What are Commission's Exhibits 2 and 3 for identification?

A. Packages of Marmola Prescription Tablets.

Q. Are they the same style of package that was used by the old Marmola Company, the predecessor to the Respondents, in the marketing and sale of the product Marmola?

A. I think they are.

Q. I note that they were adopted in the year—that form of package, I note on Commission's Exhibit—

A. 2.

Q. (Continuing)—2, for identification, this language: "This new style package adopted July 1, 1922. Package patented March 9, 1920." Is that the fact?

A. That was adopted—that was not adopted, of course, by the Raladam Company.

Q. That was adopted by the—

A. Old Marmola Company.

Q. (Continuing)—old Marmola Company?

A. Yes.

Q. And they are now used by the Raladam Company?

A. Yes.

Q. The same packages and the same language?

A. Yes.

Q. I will ask you to open Commission's Exhibit 2 marked for identification and state what it contains.

A. It contains thirty-six Marmola Prescription Tablets. It is not necessary to tell about that.

Q. No, that is sufficient for that.

A. A booklet entitled "Thank you for trying Marmola Prescription Tablets."

Q. The next?

A. A circular which is a pink circular for identification headed "Use Dilaxin with Marmola." On the opposite side of the pink circular it is headed "How to Reduce. Read the book."

Q. And what else?

A. An envelope which contains four Dilaxin tablets as a sample.

Q. Now, do all packages of Marmola contain those articles which you have just described?

A. They do.

Q. And they are put in there at whose direction?

A. The Raladam Company's.

Q. And put in by Parke Davis?

A. And put in by Parke Davis.

Q. Were those same tablets or tablets containing the same ingredients and the booklet marked "Thank you" —where is your formula?

A. It is in here.

Q. (Continuing)—placed in the boxes which were sold by the old Marmola Company?

A. Nearly the same. The booklet has been changed by the Raladam Company.

Q. In what respect?

A. Well, now, I cannot tell you. I would have to go and get one of the old ones, and compare them.

Q. Do you have one of them with you?

A. No, I have not. It does not amount to much. It is merely—

Q. Is the formula—

A. The formula is just the same.

Q. There is a formula in what you call the booklet marked "Thank you," on what page?

A. Twenty.

Q. Page twenty?

A. Yes.

Q. And the formula placed in the packages sold by the old Marmola Company was the same as now appears on page twenty of the booklet, is that the fact?

Edward D. Hayes

A. That is right.

Q. Was this pink piece of paper marked "How to reduce" on one side and "Use Dilaxin" on the other, and the envelope containing, you say, two grains—

A. I do not think this was in, but I think this was in.

Examiner Averill: Wait now. When you say "this" we don't know what it means.

The Witness: But this one here, that has been changed.

By Mr. Hornbrook:

Q. You do not know whether the "How to reduce" pamphlet was in the packages sold by the old Marmola Company?

A. However the reading on that too, has been changed by the Raladam Company.

Q. How about the package containing samples of Dilaxin?

A. That is just the same.

Q. Just the same?

A. Yes.

Q. Those boxes, Commission's Exhibits 2 and 3 were used by the old Marmola Company how long?

A. Since July 1, 1922.

Mr. Hornibrook: We offer in evidence Commission's Exhibits 2 and 3.

Examiner Averill: Any objections.

Mr. Gust: No objection.

Examiner Averill: Gentlemen, the two packages with their contents will be received and marked respectively Commission's Exhibits 2 and 3.

(The packages were thereupon received in evidence, and marked Commission's Exhibit Nos. 2 and 3, respectively.)

By Mr. Hornibrook:

Q. Now, after the hearing before the Postal Authorities the old Marmola Company, you say, was dissolved?

A. Yes, sir.

Q. How long after that hearing was it discovered?

A. I think from the early first of April to the 30th of April, 1927.

Q. This remedy Marmola is sold for the purpose of reducing fat, is that the fact?

A. Yes, sir.

Q. Now, when the Marmola Company, the old Marmola Company was dissolved what process did you go through to bring about that dissolution?

A. Well, I think the lawyers could tell that. I do not know.

Q. Was there a receiver appointed?

A. No.

Q. At the time of the existence of the Marmola Company, the old Marmola Company, was there not a corporation called McKerry, Hayes & Company?

A. That was a new corporation.

Q. When was that organized?

A. I have not got that date. Sometime—it was just about the time that the Raladam Company was organized. I cannot—

Q. And were you connected with that corporation?

A. Yes, sir.

Q. In what capacity?

A. I am the President of it.

Q. And is it still in existence?

A. It is.

Q. Has it its offices in the same building?

A. Yes.

Q. That the old Marmola Company did have?

A. Yes.

Q. And also the same building that the Respondent now has its office?

A. Yes.

Q. Is that a fact?

A. Yes.

Q. And in the same room?

A. Yes.

Q. Are you the President of it?

A. Yes.

Q. And who was Mc Kerry?

A. Well, that was just a name I adopted for a name for the Company.

Q. You really at the time of the organization of the Mc Kerry, Hayes Company owned the old Marmola Company, didn't you?

A. Yes.

Q. Then you caused the Marmola Company to be dissolved?

A. I did.

Q. And the Mc Kerry, Hayes Company, you owned that?

A. Yes.

Q. And it took over the business of the old Marmola Company, isn't that a fact?

A. That is, they took over the assets of the old Marmola Company those assets that the Raladam did not take over.

Q. Is it not a fact that the Mc Kerry, Hayes Company took over all of the assets and good will of the Marmola Company?

A. No, it is not.

Q. Who did take over—what did the Mc Kerry, Hayes Company take?

A. Mc Kerry?

Q. Mc Kerry, yes.

A. Mc Kerry. I might go back and say that I took that name from my mother's maiden name. I wanted to have a name for the Company and I just took that name.

Q. Yes.

A. Now, the Mc Kerry, Hayes Company took over office furniture. I think that is about all. That is all there was left. There was not anything left to take over.

Q. Then at that time you owned all of the business of the old Marmola Company?

A. Yes. Not at that time.

Q. What?

A. No, I think I had sold—the Marmola Company had sold to the Raladam Company its trade-mark, prescription and stock of manufactured Marmola.

Q. And good will?

A. No good will.

Q. And—to the Raladam Company?

A. To the Raladam Company.

Q. Now, that Raladam Company you caused to be organized, didn't you?

A. I?

Q. Yes.

A. Yes.

Q. How much of this stock do you own now?

A. I don't know. I would have to look on the records.

Q. You own a majority of it, don't you?

A. I do, yes, sir.

Q. You own nearly all of it, don't you?

A. Yes, nearly.

Q. So you organized the Raladam Company for the purpose of carrying on the same business that had been carried on by the old Marmola Company?

A. No, not the same business.

Q. The same business, Mr. Hayes, was it not?

A. No.

Q. Except that you omitted the mail order feature of it, is that the fact?

A. Well, practically, yes.

Q. Yes.

A. Omitted the mail order.

Q. Yes.

A. Cut out the mail order business altogether.

Q. And abandoned the use of the name "Marmola" in connection with the sale—that is the use of the corporate name "Marmola" and adopted the name "Raladam"?

A. Yes, and just organized a new company altogether.

Q. A new company, yes?

A. And this company, this Raladam Company was operating since before the hearing in Washington. In fact, it was doing all the trade business. The Marmola Company was doing only a mail order business.

Q. And you are the general manager and the principal owner of the Raladam Company?

A. Yes.

Q. And you are selling the same product that the Marmola Company sold?

A. Yes.

Q. And you advertise Marmola under the name "Marmola"?

A. Yes.

Q. But you do not now use the corporate name "Marmola Company"?

A. No, sir.

Q. I now ask you whether or no there was a fraud order issued against the old Marmola Company?

Mr. Gust: If the Court please I object to that as being incompetent and irrelevant and immaterial.

Examiner Averill: Gentlemen, as intimated before at this stage I must sustain that objection. We have had no proof yet of the allegations of the complaint, which allege that the preparation now being sold by the Raladam Company is so represented as to be misleading and until the case in chief is established I do not think it would be competent to go into collateral issues as to what may have been done in connection with another legal entity, which may have.

marketed a similar product at some time before the formation of the present Respondent company. I do not need to say that it might not, under a certain conditions of the testimony become pertinent and therefore admissible but at this state I do not think that it is, and for the present I must sustain the objection.

By Mr. Hornibrook:

Q. How many of these tablets do these packages like Commission's Exhibit 2 and 3 contain?

A. Thirty-six.

Q. How many?

A. Thirty-six.

Q. How many packages per year has the Raladam Company sold of this Marmola remedy?

A. Something over a million.

Q. Per year?

A. In one year.

Q. In one year?

A. Yes.

Q. I asked you to bring with you the formula from which Marmola is made. Do you have that with you?

A. Yes.

Q. Will you produce it?

A. (Witness produces paper.)

Mr. Hornibrook: Mark that please.

Examiner Averill: The paper will be marked Commission's Exhibit 4, for identification.

(The document was thereupon marked Commission's Exhibit No. 4, for identification.)

By Mr. Hornibrook:

Q. What is Commission's Exhibit No. 4, for identification?

A. The formula of the Marmola Prescription Tablets.

Mr. Hornibrook: I offer that in evidence.

Mr. Gust: No objection.

Examiner Averill: The paper will be received and marked Commission's Exhibit No. 4.

(The document was thereupon received in evidence and marked Commission's Exhibit No. 4.)

Edward D. Hayes

By Mr. Hornibrook:

Q. Who evolved that formula?

A. That formula was made originally by the Ray Chemical Company.

Q. Of where?

A. Detroit, Michigan.

Q. When was that?

A. 1907.

Q. How did you come by it?

A. They submitted it to me. Mr. Ray of that company submitted it to me as a formula for the treatment of obesity and asked me to market it, telling me that the doctors in this concern,—

Mr. Hornibrook: Now, just a minute. We are not concerned about that. I move that be stricken out as not responsive. I asked him who originally originated this formula and that is all I want to know.

Examiner Averill: He has not said what he told him. Go ahead.

The Witness: I do not know what the doctor's name was.

By Mr. Hornibrook:

Q. You do not know the doctor who originated the formula?

A. I may have known him at the time, but that is a long time ago.

Q. That was in 1907, you say?

A. Yes.

Q. Parke Davis did not originate this formula?

A. No.

Q. Parke Davis have nothing to do with Marmola except to manufacture it at the directions of the Respondent, using this formula which you have submitted here, is that a fact?

A. Not exactly.

Q. What is the fact?

A. The facts are these: That I submit the formula to them, I consult with them about the formula, if in their judgment they think the formula should be changed, or something taken out or something added to it, and make a better product, and I always act on their advice.

Q. Well, when did you say Parke Davis began to manufacture that?

A. I would say about ten or twelve years ago.

Q. Have—has that ever been changed since that time?

A. Yes.

Q. I notice the—

A. Well, it has been changed—none of the essentials have been taken out or any new essentials put in but the dosages have been changed.

Q. In what particular instance?

A. Well, phenolphthalein. That was changed.

Q. Spell that for the reporter please?

A. (Witness spells phenolphthalein.)

Q. How much of a change has been made in that?

A. Well, that was left out altogether during the War. It was very difficult to get it. It was imported from Germany, and after the War was over it was put back in again.

Q. Did Parke Davis advise that being taken out?

A. They advised us taking it out because it was difficult to get and then we increased this dose of extract of cascara in order to make up for this lack of phenolphthalein.

Q. And you increased what?

A. Increased the dose during that time of this extract of cascara.

Q. This extract of cascara—

A. Up here, see?

Q. Yes. This extract of cascara as shown in Commission's Exhibit 4, and the phenolphthalein are laxatives are they not?

A. Yes.

Q. In what other respect was that changed since Parke Davis began to manufacture it?

A. The desiccated thyroid.

Q. Desiccated thyroid?

A. Yes.

Q. How was that changed?

A. That was three-fourths of a grain and it was changed to a half a grain.

Q. At whose suggestion was that changed?

A. By Dr. Klein of the Parke Davis Company.

Q. Dr. Klein?

A. Yes, Dr. Klein.

Q. What reason did he assign for making that change?

A. The reason he assigned was this, that the thyroid put out by Parke Davis was much stronger and a better

product than put out by any pharmacetical house, that we got the same effect from a half a grain of their desiccated thyroid than we would from three-fourths of a grain of someone elses.

Q. Did he suggest that three-fourths of a grain of their desiccated thyroid was a dangerous dose?

A. No, he did not.

Q. He did not?

A. No.

Q. At one time you had or your formula contained or your tablets contained, as made from your formula one grain of desiccated thyroid didn't it?

A. I think that was true way back in 1910 or 1911.

Q. Then you changed your three-fourths of a grain?

A. That was done when the Ray Chemical Company was making it.

Q. Then why was it done?

A. Well, Mr. Ray told me that he could not get the thyroids. He had to cut the quantity down or we had to go out of business, or he could not—at that time there was a shortage of thyroid glands. They only got this thyroid gland at that time from sheep.

Q. You make your principal claim, do you not, as an obesity cure upon the fact that the ingredient of desiccated thyroid is in your preparation, is that the fact?

A. Some of the advertising copy mentions that.

Q. Yes.

A. Some of it does not mention it at all.

Q. Yes.

A. In some of them we do not make any claim about it. In the little booklet in the package, I think, it speaks about it, and that is one of the ones that tells of it.

Q. And still because thyroid back in 1911 was difficult to get you reduced the dose from a whole grain to three-fourths of a grain, is that a fact?

A. Well, it was reduced—I cannot tell just how much. I remember that distinctly, however, that it was reduced, and at that time they had—I do not believe they had much if any—they did not know very much about desiccated thyroid. They were unable to tell just what its strength was, and there was a lot of discussion. I had to leave it, of course, to the Ray Chemical Company.

Q. As the result of that discussion they reduced the doses from three-fourths of a grain to a half a grain? Is that the fact?

A. Oh, no.

Q. Or from one grain to three-fourths of a grain?
A. Yes, sir.
Q. What was the nature of that discussion? Was the question of the danger of thyroid brought up?
A. Not at all, never was mentioned. I do not think there was anyone that ever questioned its being dangerous.
Q. You do not think so now, do you?
A. I think that now there may be a few people who are questioning it.
Q. From your own opinion?
A. I do not question it.
Q. You think there is no danger?
A. Not at all.
Q. From the administration of thyroid in any quantity?
A. I won't say that, in any quantity.
Q. What do you say as to a grain?
A. I do not think there is any danger in a grain.
Q. Administered four times a day?
A. Yes.
Q. That is your suggestion is it not, to your customers that they use these tablets four times a day?
A. Yes, sir.
Q. You think there is no danger in administering a dose of one grain four times a day?
A. I don't think there is.
Q. What would you say about a grain and a half?
A. Well, now, I don't know. I don't know that my opinion of it would amount to anything or what—my opinion would be worth in there, I think the doctors can testify in regard to that.
Q. You are not a doctor?
A. No, sir.
Q. Did you ever study medicine?
A. No, sir.
Q. And do you have any degrees of any kind?
A. No, sir.
Q. Are you a scientific man?
A. No, sir.
Q. Do you know anything about drugs?
A. Not particularly, only what anyone a layman would gather from being in a business such as this.
Q. Do you know from what products these drugs are made?
A. Do I know what products they are made of?
Q. From what they are made?

A. All of them?

Q. Yes.

A. I would not say that I did.

Q. Is it not a fact, Mr. Hayes, that these last nine drugs that are named in the formula, Commission's Exhibit 4, are simply there for the purpose of carrying it and giving it body?

A. Yes. That is what they are. That is what they are.

Q. How about the oil of sassafras?

A. That is also.

Q. And how about the anise, oil of anise?

A. That is also.

Q. And methyl salicylate?

A. That also.

Q. How about this calcium carbonate precipitated?

A. We carry that to make the tablet.

Examiner Averill: Make what?

The Witness: Make the tablet.

By Mr. Hornibrook:

Q. It has no—

A. None of this do we claim has anything to do with the reduction of flesh.

Q. Yes.

A. Neither has the oleoresin ginger, nor the cascara.

Q. Was phenolphthalein in use as a laxative, say 1909, years nine year ago?

A. Yes, sir.

Q. It was?

A. Yes, sir.

Q. You spoke of Parke Davis and Company saying that they thyroid, desiccated thyroid, was better than other peoples. Is it not a fact that the pharmacopoeia standardized the drug called thyroid?

A. I do not know whether it is in there.

Q. Did you ever see the pharmacopoeia?

A. I have looked into them, but I have not gone into them.

Q. Do you have one?

A. I cannot say as to that.

Q. Do you have one?

A. No.

Q. Is it not a fact that thyroid has been generally obtainable without restrictions for the twenty years last past?

A. What is that.

Mr. Hornibrook: Please read him the question. (Question read as recorded.)

A. I think it has.

By Mr. Hornibrook:

Q. So you bought this formula in 1907 you say?
A. I did not buy it.
Q. You did not buy it?
A. No.
Q. How did you come in possession of it?
A. Through the Ray Chemical Company.
Q. Then you organized the old Marmola Company for the purpose of making this anti-fat remedy?
A. Yes, sir.

Mr. Connor: You did not make it?
The Witness: No, I did not make it.

By Mr. Hornibrook:

Q. Sell it?
A. It was made by the Ray Chemical Company.
Q. For the purpose of selling it?
A. Yes, for the purpose of selling it.
Q. Prior to that were you connected with any patent medicine concern?

Mr. Gust: I object to that if the Court please, as wholly foreign to this inquiry.

Examiner Averill: What is the purpose?

Mr. Hornibrook: He maintains in his advertising that Marmola is the result of scientific research and I want to find out how much scientific research there is in it, how much scientific research has been carried on by him.

The Witness: I have not carried out any.

By Mr. Hornibrook:

Q. You have been in the patent medicine business before this, haven't you?

Mr. Gust: I object to that, if the Court please.

Examiner Averill: Gentlemen, I can see no foundation laid for inquiry as to that. The witness tells us that he himself is not a doctor, not a medical man

of any type or character, and I do not see what his connection, if he had any connection with other prepartions which may have been sold has to do with this complaint at this time.

Mr. Cantwell: Mr. Commissioner, I would like to object to counsel calling this a patent medicine. There is no patent issued. The formula is printed, and I would like that inserted in the record.

Examiner Averill: Well, gentlemen, there has been no attempt here to produce any proof so far that this is a patent medicine. He may have in the course of his remarks said something that might carry with it an implication that it was, but I cannot see anything special in that.

By Mr. Hornibrook:

Q. Where did the name "Raladam" come from?
A. Just manufactured.
Q. What?
A. Just took the alphabet, the letters.
Q. Who took it?
A. And twisted it around until it came to a name.
Q. Who took it?
A. I think someone of the girls in my office did it.
Q. When you speak of your office, do you speak of the office of the old Marmola Company?
A. Yes.
Q. Now, I asked you in the subpoena duces tecum for the old formulae. Do you have them with you?
A. What?
Q. I asked you in the subpoena duces tecum for the old formulae for Marmola. Do you have them with you?
A. I have not. I could not find them.
Q. But with the exceptions which you have noted in your testimony they were the same as the present formula for Marmola?
A. Yes, that is the only change that has ever been made in the formula in my recollection and belief.
Q. The old Marmola Company used the formula that is now used by the Raladam Company for how many years?
A. With the exception of those changes since 1907.
Q. Yes, I understand, but I am asking you now how long the old Marmola used this identical formula that is now used by the Raladam Company?

A. I do not—since—

Mr. Gust: I do not believe you make yourself clear.

Examiner Averill: You see, the testimony is now—

The Witness: I think the Marmola—

Examiner Averill: Just a minute. (Continuing —with the exception of the time during the War when one of the ingredients was difficult to get and the increase of the quantity of another laxative ingredient until the market was in such condition that they could again obtain the first ingredient which they cut out for that period, that they were the same. I do not know that it is essential. If it is, of course, you could study it and find out the exact number of months that it was off the market, but that is the only change.

Mr. Hornibrook: I am glad the Court understands it. I thought that the record was a little bit vague on that and I was trying to get the witness to give us approximately when it was.

The witness: I can get that from the company's records. That it is the only way in which to get it.

By Mr. Hornibrook:

Q. Well, give us the approximate number of years the old Marmola Company used this particular formula that is now being used by the Raladam Company approximately. Cannot you figure that from during the War?

A. Oh, approximately eight or ten years.

Q. What does this product Marmola sell for at retail?

A. $1.00 a package.

Q. Do you have larger boxes than that that you put on the market?

A. No, sir.

Q. No?

A. No, sir.

Examiner Averill: Do you say yes or no? I did not catch the answer. I just asked whether he said yes or no to that.

A. No.

Examiner Averill: No?

By Mr. Hornibrook:

Q. You say you place no restriction on the retail druggists to whom they sell as to the number of boxes that they may sell to one customer?

A. We do not.

Q. The old Marmola Company advertised its product?

A. It did.

Q. For how many years?

A. Well, from 1907 up until January—up around January, 1927, around the first of January I think it was, 1927.

Q. Advertised it as an obesity cure?

A. No, as an obesity treatment.

Q. Treatment?

A. Yes.

Q. You make that distinction?

A. Yes.

Q. Between cure and treatment?

A. Yes. We never called it a cure, I do not believe.

Q. You do not believe it will cure obesity?

A. Now, that is another thing.

Q. You would not say that it would?

A. I do, that it will.

Q. You do say it would?

A. I say I believe it will cure, but we do not claim that it does, that I ever did.

Q. Did you advertise the old product when it was sold by the old Marmola Company in the newspapers and magazines throughout the United States?

A. Yes.

Q. You now advertise Marmola the Raladam Company does?

A. Yes, sir.

Examiner Averill: Answer please audibly so we can hear you.

Mr. Connor: Mr. Hayes, the stenographers when they are looking at their notebooks cannot see your nod or the shake of head. Will you answer please and help them out.

The Witness: I beg your pardon.

Mr. Hornibrook: Mark this Commission's Exhibit 5 for identification, please.

Examiner Averill: Gentlemen, I have marked a paper headed "Representative list of publications

which carry out advertising"; I have marked it Commission's Exhibit No. 5 for identification.

(The document was thereupon marked Commission's Exhibit No. 5 for identification.)

By Mr. Hornibrook:

Q. I ask you to examine that and state whether or no that contains a complete list of the mediums which respondent uses in advertising Marmola?

A. No, it is not.

Q. It is a partial list?

A. It is a partial list.

Q. The names of the magazines and papers are the true names of the publications in which you advertise?

A. Some of these publications may not be running the copy now, but it was when this was written.

Q. At some time the Raladam Company has advertised in—

A. Not the Raladam Company; the Marmola Company.

Q. The Marmola Company?

A. Adverised in this list of papers at one time.

Q. And did they run the same ads that are now being run in newspapers and magazines by the Raladam Company?

A. No.

Q. Were some of them the same?

A. I do not think so.

Mr. Hornibrook: We offer that in evidence.

Mr. Gust: Let me see that. We object to the document marked Exhibit 5 for identification for the reason that it purports to be a list of advertising mediums used at one time by the Marmola Company, which does not purport to be the list or in any way concern the respondent.

Examiner Averill: Gentlemen, I fear very much that unless we first introduce evidence as to what the respondent is doing, not confused with what some predecessor who are not respondents may have done, that we are going to get a record which will be subject to many objections particularly if the matter is to go to the Courts. An administrative body can often handle matters which does not come within the strict laws of evidence, but I am afraid that if we get to the Courts it is going to make a confused record. I think it would be wiser to prove what the

Raladam Company is now doing and has done since its organization in 1927, and then if it appears to be proper and to be connected with the issues involved in this cause, then to go into the question, if it does appear to be proper and pertinent as to what was done by predecessors of the Raladam Company. I only fear that we won't be able to say what the Raladam Company has done and they are the people who are charged here with certain things.

Mr. Hornibrook: Well, Mr. Examiner—

Examiner Averill: And I must sustain the objection to that particular paper which is offered.

Mr. Hornibrook: Mr. Examiner this simply goes to the order of proof. Am I not to say about the order in which I desire to put these things in? This is clearly admissible for the reason that it goes to show the public interest. The witness has already testified that for eight years they used exactly the same formula when they sold it under the name of Marmola as the respondent used and is now using, and I am trying to get to the Commissioner's mind, I am trying to get it to the Examiner's mind, that it was so universally advertised and so universally used and that there is a great public interest here.

Now, that is the purpose of offering this. It may be a little bit out of order but to restrict the trial attorney in a case of this kind to a strict order of proof in an equitable proceeding is something I have never heard of.

Examiner Averill: It may be—

Mr. Hornibrook: The Examiner is an intelligent man and the Commission is composed of intelligent men and the Courts who finally pass upon this will of course be intelligent and there is no possible chance of confusing the issues, as in a matter before a jury. Of course, the Examiner has the last word, but that is my purpose.

Examiner Averill: I am glad to learn the purpose, but at the same time it seems to me that it is just as easy and would not put counsel to any further trouble to have the witness testify as to what mediums the Raladam Company has used and is using and with that evidence in the record, then, as I said, if it was essential to show that those same mediums and other mediums had been used by other companies, predecessors of this company, in the marketing of the

product known as Marmola I think that it might be pertinent and relevant.

Mr. Hornibrook: That is exactly what I propose to do, Mr. Examiner. I was going to have him —I was going to follow this question up and have him point out the papers and the magazines that the Raladam Company now uses and make any additions to this list that would conform to the facts.

Examiner Averill: I have no objection—

Mr. Hornibrook: But if you prefer I will go first to the Raladam Company.

Examiner Averill: I have no objection to the witness using the list in refreshing his memory and using it for that purpose, but as to adopting it at this stage as an exhibit, I will have to sustain the objection to it.

By Mr. Hornibrook:

Q. State what mediums the Raladam Company uses and has used during its organization for advertising purposes?

A. I cannot state.

Q. State some of them?

A. I cannot even—I can state now that we are using the magazine Liberty, Motion Picture Classic, Screenland, Smart Set, the newsstand group.

Q. What do you mean by the newsstand group?

A. That is a group of magazines—

Q. What are their names?

A. I don't know.

Q. Are there several of them?

A. Yes, several of them. I don't know. I have an advertising agency here that has got all of this, has got this full list. They could give it to you right. I cannot.

Q. Will you supply us with a full list of the mediums that you use at a later hearing?

Mr. Connor: Yes, we will do that.

A. All right.

By Mr. Hornibrook:

Q. You are using the daily papers, aren't you now in advertising Raladam?

A. Yes.

Q. These magazines which you have named are circulated throughout the United States, are they not?

A. They are.

Q. And do you recall what papers you are using? Any Chicago papers?

A. I think the Post and Journal.

Q. Any papers in Detroit?

A. Yes, sir.

Q. What are they?

A. Free Press, and Evening News.

Q. Any papers in Cleveland?

A. Yes, sir. I cannot give you the names of them.

Q. That is all right. Any daily papers in New York?

A. Yes.

Q. Pittsburgh?

A. Yes, sir.

Q. Philadelphia?

A. Yes, sir.

Q. Boston?

A. Yes, sir.

Q. Indianapolis?

A. Yes, sir.

Q. Kansas City?

A. Yes, sir.

Q. St. Louis?

A. Yes, sir.

Q. In fact, in the daily papers in the principal cities throughout the United States?

A. Yes, sir.

Q. You advertise Marmola?

A. Yes.

Q. What amount do you expend approximately in advertising the product Marmola a year?

Mr. Gust: We object to that if the Court please, the amount of money. We do not object to the extent of the advertising, but we do object to the amount of money that is spent.

Examiner Averill: Why?

Mr. Gust: Well, we do not think it is anything relevant to the inquiry here, the money that this particular advertising may cost us. Now, he is going, as I understand it to show the extent of the public interest, and the public interest is not affected by how much we may pay for advertising. It may be affected by what mediums we use and where they are used, but the money that we may spend is wholly foreign to the inquiry here.

Mr. Cantwell: It does not tend to prove the issues in the complaint.

Examiner Averill: Now, you were not specifically charged with using an excessive amount of money. Mr. Hornibrook what is the purpose—of course, in that question, if you have a real purpose in view I would like to know what it is so I can form a better idea.

Mr. Hornibrook: At this stage of the proceedings if the Examiner pleases, we have not a complete list of the mediums that he uses.

Examiner Averill: Yes.

Mr. Hornibrook: He is unable to give us the number of the insertions in which the advertisement has appeared and I thought if the commission could get an idea of the volume of money, the amount of money that was spent it would give them some idea of the extent of the advertising indulged in by the defendant. But I am not particular about that.

Examiner Averill: Gentlemen, I do not think that at this stage the question is relevant, and the objection is sustained.

By Mr. Hornibrook:

Q: Now, again examining Commission's Exhibit 5 for identification state what that is?

A. Why, this is a list of newspapers and magazines that the old Marmola Company used, and was given, I believe to some post office inspector.

Mr. Hornibrook: We offer that in evidence.

Mr. Gust: We make the same objection to it that we did before.

Examiner Averill: Well, gentlemen, this now at this stage and with the evidence given by the witness would go to show that prior to 1927 these various newspapers and publications mentioned in this list were publications which were used in the advertising of the preparation known as Marmola. It would go to show that the preparation—I am not speaking of the parties who advertised, but that the preparation was a preparation which had been advertised to the public throughout a number of years prior to the year 1927, and in that way it might have brought some connection and I can see where it might be of value, under certain phases of the testi-

mony to be developed to both sides, both to the respondent and to the Commission.

Mr. Connor: Has your Honor got in mind the fact that the advertising in those publications was entirely different from the advertising of the Raladam Company, since that paper?

Examiner Averill: We have no proof yet, not a single bit of proof or a bit of proof as to the wording of any advertisement inserted in newspapers or magazines, you see, so that will come up when that comes up. So that in my judgment with the foundation, as I deem it, laid, the paper in question will be received in evidence and marked Commissioner's Exhibit No. 5.

Mr. Connor: Subject to our objection?

Examiner Averill: Certainly.

Mr. Cantwell: We take an exception to it.

(The document was thereupon received in evidence and marked Commission's Exhibit No. 5.)

By Mr. Hornibrook:

Q. In the subpoena duces tecum you were requested to bring with you samples of your advertising used in connection with the marketing and sale of Marmola. Did you bring them along?

A. This subpoena I did not get until yesterday afternoon and I did not have time to make any collection of the advertising that was there, so I have had to take it up with our agency here, who have got copies of all of it. It is being prepared and I have not gone over them, but I will have them here for you soon.

Q. Yes, I wish at some hearing you would produce them all?

A. Yes.

Mr. Hornibrook. Will you mark these?

The Witness: If that will be all right, I can bring them tomorrow.

Mr. Hornibrook: Yes.

The Witness: All right.

Examiner Averill: Off the record.

(Discussion off the record.)

Examiner Averill: Now, these you want marked, is that the idea?

Mr. Hornibrook: Yes.

Examiner Averill: Gentlemen, I have three pap-

ers here and have marked them Commission's Exhibit 6, 7, and 8 for identification.

(The documents were thereupon marked Commission's Exhibits Numbers 6, 7 and 8, for identification.)

Mr. Hornibrook: If you gentlemen want to see any of these, just say so.

Examiner Averill: Yes, all these gentlemen.

The Witness: That is just advertising copy of the Raladam Company.

By Mr. Hornibrook:

Q. What are Commission's Exhibits—what were their numbers?

Examiner Averill: 6, 7, and 8.

By Mr. Hornibrook:

Q. (Continuing) 6, 7, and 8.

A. Copies of advertising matter of the Raladam Company.

Q. Were they run in the different newspapers and magazines of which you have testified?

A. I would like to qualify that by stating I believe they are. Sometimes this copy is gotten up and then it is discarded without being published, but I believe all of these copies here appeared in the newspapers and magazines.

Q. You have no doubt about that?

A. Not much of any, but then it is possible that this copy here might not have appeared, and that it was thrown out. I cannot tell.

Mr. Hornibrook: I offer them in evidence.

The Witness: I believe, however, all of them were run in the papers.

Examiner Averill: Now, when you say run in the papers you do not mean—this is only for clarity—you do not mean that each one of those copies was run in each of those papers in the various cities of the country that you have mentioned? Do you or don't you mean that they were run in some of those mediums, the advertising?

A. That is what I mean.

Examiner Averill: Or do you mean they run in all of them?

The Witness: That is exactly what I mean. They do not run in all of them.

Mr. Hornibrook: No.

The Witness: One set of copies would appear in certain newspapers of certain circulation. Another set would appear in papers of a smaller circulation. Some copy would appear in one magazine only, and never appear in any other, but what I mean is that this copy has been used for publicity purposes in selling Marmola.

By Mr. Hornibrook:

Q. You are satisfied that those copies all have been used in some advertising—

A. Medium.

Q. (Continuing)—medium?

A. Yes.

Mr. Connor: There may have been one or two thrown out. We have to check the record.

The Witness: That is what I say. There may have been one or two thrown out.

Mr. Gust: We do not have any objection to them, with the right to check them over and compare with the complete set which we are quite glad to furnish you. If it appears there is something here that is not in the complete set, we reserve it for the further evidence by the Government or ourslves, as to whether that particular advertising ever appeared anywhere.

Examiner Averill: In other words, you offer no objection at the present time, but subject, after you check them over, to offering evidence showing that some particular ones of these copy may have been killed, as I would express it?

The Witness: Yes.

Examiner Averill: And not run?

Mr. Gust: That is right.

Examiner Averill: Is that satisfactory?

Mr. Hornibrook: Yes.

Examiner Averill: Then, gentlemen, the papers in question will be received and marked Commission's Exhibits 6, 7 and 8.

(The documents were thereupon received in evidence, and marked Commission's Exhibits 6, 7, and 8, respectively.)

Mr. Hornibrook: Then you will bring me tomorrow copies of your advertising, with a list of the

mediums in which this advertising matter appeared with reference to the Raladam Company?

The Witness: Yes, sir.

Mr. Hornibrook: And also I want samples of your advertising matter and the mediums used with reference to the old Marmola Company?

The Witness: Now, I do not know whether I can furnish those or not.

Mr. Gust: We, of course, object to producing that or to its being offered.

Mr. Hornibrook: Well, I issued a subpoena duces tecum, or had it issued.

Mr. Gust: As far as we are able we will produce it for the Commission's ruling, everything that we can obtain that you asked for.

Mr. Connor: Everything about the old Marmola Company we should not produce.

Mr. Gust: We will produce it, if we can. He has got a right to have us bring it in.

Mr. Hornibrook: You, of course, have a right to make an objection when the offer is made.

Mr. Gust: Certainly.

By Mr. Hornibrook:

Q. Mr. Hayes, there are others selling obesity cures, are there not?

Mr. Cantwell: Object to the word "cures" if the court pleases.

Mr. Hornibrook: We will change it to "treatment" then.

Mr. Cantwell: "Treatment" is better.

A. I do not know of any internal selling through the trade at this time. There is some bath salts for the reduction of flesh.

By Mr. Hornibrook;

Q. That is being sold in the different states, is it not?

A. The bath salts?

Q. The bath salts?

A. Yes.

Q. A nationally advertised remedy is it not?

A. I think so, yes.

Q. Is it not a fact that there are institutions, such

for instance as the Battle Creek Institution run by Dr. Kellogg, which sells cures for obesiy?

A. Not that I know of.

Q. Do they not—

Mr. Cantwell: Object to the word "cure" again.

Mr. Gust: He can ask him.

By Mr. Hornibrook:

Q. Are you familiar with the Physical Culture Magazine?

A. I have seen it, but I could not say that I was familiar with it.

Q. Do you know whether Mac Fadden sells advice for the reduction of flesh?

A. No, I do not.

Q. Or fat?

A. No, I don't.

Mr. Gust: What is the name of that magazine?

Mr. Hornibrook: I think it is "Physical Culture."

Examiner Averill: Read that question again.

(Question read as above recorded.)

Examiner Averill: Whether Mac Fadden sells advice for the reduction of fat?

Mr. Hornibrook: Yes.

Examiner Averill: I did not catch the question. What was his answer?

A. No, I do not know.

By Mr. Hornibrook:

Q. Have you not seen advertisements for courses of exercises and diet which are supposed to reduce fat?

A. I think they were all mail order concerns, but who they are and just where they are I cannot recall.

Q. You know there are such concerns in existence?

A. I do not know there are now.

Q. Yes.

A. I recollect seeing some advertisments or noticing them sometime ago, but I do not recall any just now. There was a million of them some years ago, but I do not know where they are. There are people who have got machines, you know, peddling them for reducing flesh.

Q. Did you ever hear of "Every Woman's Flesh Reducer"?

A. Never heard of it.

Q. "Fat Off"?

A. I have heard "Fat Off" but I never saw an advertisement of it that I recall. I think I heard an advertising man—it seems to me an advertising man spoke to me about it. I am not familiar with it. I never follow these other people or pay any attention to what they do.

Q. I am just trying to refresh your memory, Mr. Hayes?

A. Yes.

Q. I am taking this method of showing that you have competitors I may have to put somebody else on the stand unless your memory will serve me.

A. I had a lot of competition a few years ago. I have not any now. I say I have not any now. I have, but I do not know who they are.

Q Yes.

A. That is, in taking internal—

Q. Did you ever hear of the "Get Slim" remedy?

A. No. "Get Slim" remedy?

Q. Yes.

A. I might have heard of it but I cannot just recall it.

Q. The Oil of Koerin?

A. I have heard of that but they have been out of business for years and years. I think you will find all that you have got there, they are non-existant.

Q. How about Morlene?

A. That is for your eyes; is it not? That was not an obesity cure, was it?

Q. Morlene?

A. Morlene, that is. I never heard of it that I can recall.

Q. Parnotid?

A. Never head of them.

Q. Pytholine?

A. Never heard of them.

Q. Rango?

A. They have been out of business for fifteen, twenty years.

Q. Yales Fertilizer Tablets?

A. Never heard of it.

Q. Is that salt cure which you spoke of as knowing now being in existance called "Louise-In-Bad Reduction Salts"?

A. No, sir.

Q. Did you ever hear of that?

Edward D. Hayes

A No, sir.

Mr. Hornibrook: I am not excusing Mr. Hayes but that is all for today.

Examiner Averill: Now, off the record.

(Discussion off the record.)

Mr. Hornibrook: I have now introduced some of the advertising matter in substantiation of what the complaint alleges. I have understood the Examiner to take the position that testimony as to Marmola was not admissible, that is, as to the hearing before the postal authorities with regard to Marmola was not admissible until a prima facia case had been made by the attorney for the Commission. I now desire to ask this witness some questions with reference to the hearing by the Postal Authorities in the Marmola matter.

By Mr. Hornibrook:

Q. The postal authorities did not issue a fraud order against the Marmola Company, did they?

Mr. Gust: Now, if the Court please, we object to the testimony regarding the hearing had before the Postal authorities by the Marmola Company for the reason that we are charged here with having done certain things, the Raladam Company and the issue here is whether or not we have fraudulently advertised our products. The issue necessarily before the Post Office Department was whether or not Marmola had by the use of the mail permitted any improper ad to be published.

Examiner Averill: You mean the Marmola Company?

Mr. Gust: Yes. That is the only issue before the post office department who have jurisdiction over the mails, as to whether or not they have made any improper use of the mails, the Marmola Company.

The Raladam Company, so far as appears here, has never used the mails for any purposes, and it is wholly a collateral issue in this proceeding to investigate and again litigate anything that took place between a separate corporation and the government as to the use of the mails. It has no bearing at all upon the issue here in any conceivable way. If we are compelled to litigate the propriety of the Marmola Company's action in the use of the mails, we are taking into this hearing an issue which is entirely foreign to anything over which the Commission has any jurisdiction or has thought to exercise any jurisdiction.

Edward D. Hayes

Examiner Averill: Gentlemen, as I said before—and I do not see anything now so far to change it—until we have in evidence proof to sustain the allegations of this complaint against the present respondent the Raladam Company, that said respondent has been guilty of unfair methods of competition through dissemenating what is alleged to be false and misleading statements in connection with the product which they sell—until we have that proof in this record I cannot see where there is any foundation for us to go into the litigation of a predecessor before the Post Office Department.

Now, it is true as my friend has stated, that he has now introduced some of the advertising matter used by the Raladam Company, but so far we have no evidence which would tend to show that the statements contained in said advertising were false or misleading, and until such time as the main issues have been proved I do not think that we should go into collateral matters, where we would be compelled to go into the whole question of the Post Office investigation or hearing, whichever it was, the laws under which they were acting, into the complaint if they filed a specific complaint and as to what is charged and as to all of the matters and things which the Raladam Company may have been alleged to have done, which were alleged to be a violation of the Postal laws.

I think we had better first confine ourselves to the issues of this case, and when and if proof is introduced tending to sustain the present complaint, then it may be —I do not say that it will be, because I cannot at present see how it can be—that the evidence as to the Marmola Company and the Post Office may become relevant. You see, gentlemen, to prove now even—I do not know that they did, but admitting that the Post Office authorities issued an order against the Marmola Company at this stage, it certainly would not be evidence in this case, it would be collateral matter, because they are not a respondent here at all. In fact, the evidence now is that they are not in existence, and I think we would have to first establish a prima facia case as set up by the complaint, and then afterwards it may relevant. I do not see it at present. Off the record.

(Off the record.)

Examiner Averill: Gentlemen, we will adjourn now until ten o'clock city time, tomorrow.

Whereupon at 12:15 p. m. adjournment was taken to 10:00 o'clock A. M., July 25, 1928.

Edward D. Hayes Charles A. Elliott

Docket No. 1496.
Chicago, July 25, 1928.

Met pursuant to adjournment, 10:00 o'clock A. M. Before:

Edward M. Averill, Examiner.

Appearances:

As before.

Examiner Averill: All right, Mr. Hornibrook.

Mr. Hornibrook: Dr. Elliott.

CHARLES A. ELLIOTT, was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct Examination by Mr. Hornibrook:

Q. Give the reporter your name, please.
A. Charles A. Elliott.
Q. Dr. Elliott, where do you reside?
A. Chicago.
Q. How old a man are you?
A. I am 56.
Q. What is your occupation?
A. Physician.
Q. And how long have you been such a physician?
A. I have been a physician since 1898.
Q. From what school did you graduate?
A. Northwestern University Medical School.
Q. Are you what is known as a regular physician?
A. Yes, sir.
Q. Where is your office?
A. At 30 North Michigan Avenue.
Q. Are you connected with any hospital here in Chicago?
A. Yes.
Q. In what capacity?
A. Attending man at Wesley Memorial Hospital.
Q. What is meant by attending man?
A. Physician in charge of patients there. One of the attending physicians.
Q. With what institution is Wesley Hospital connected?
A. Northwestern University.
Q. How long have you been with that institution?
A. I have been with Northwestern University continuously since 1898.

Charles A. Elliott

Q. Are you connected with the medical department of the Northwestern University?

A. Yes.

Q. In what capacity?

A. Professor of medicine.

Q. How long have you been a professor of medicine there?

A. Since 1915 or 1917, I am not quite sure which.

Q. What degrees do you have?

A. B. S. and M. D. Bachelor of Science and Doctor of Medicine.

Q. Have you taken any post graduate work?

A. Yes.

Q. Where?

A. In Vienna, in 1904 and '05.

Q. In addition to those positions which you hold, do you have a private practice?

A. Yes.

Q. Is it extensive?

A. Well, it has been growing all the time. Yes, it is extensive.

Q. Do you specialize in any particular branch in your private practice?

A. Yes.

Q. What is that?

A. In internal medicine, diagnosis and treatment of medical disorders.

Q. Does your practice bring you in contact with people suffering from obesity?

A. Yes, a great deal.

Q. Frequently?

A. Yes.

Q. Are you familiar with the medicine known as desiccated thyroid?

A. Yes.

Q. Have you used it extensively?

A. A great deal.

Q. What is obesity, doctor?

A. It is a condition in which there is a deposit of a great deal of fat in the body.

Q. What is it caused from?

A. It may be due to such simple things as over-eating or under exercising, or it may be due to such pathological states as disturbances of the ductless glands.

Q. Is there more than one kind of obesity?

A. Yes.

Q. Just name them, please?

A. Well, the two that I mentioned; overeating, over

indulgence in food is one, and disturbances of such glands as the thyroid, the pituitary, or some of the other ductless glands.

Q. Is thyroid a remedy or a medicine that should be administered under the direction of a physician?

A. It should, in my judgment.

Q. What would you say of thyroid as to its being a powerful drug?

A. It is, very.

Q. Is it a dangerous drug to administer?

A. It is.

Q. Assuming, doctor, that a compound of drugs made into a tablet contained one-half grain of desiccated thyroid and the directions were to take four doses per day, one after each meal and one before retiring at night, and the recommendations were that that be taken until one had reduced to a satisfactory state to himself, or from sixty to ninety days, would you consider that, if those directions were followed out, dangerous to a patient?

A. Yes, I would.

Q. Why?

A. My reason for that would be that a prescription containing a half grain of thyroid, the doses recommended, aggregating two grains a day, would be a sufficient amount of thyroid to produce toxic effects in most people.

Q. What do you mean—am I interrupting you, doctor?

A. That is quite all right.

Q. What do you mean by toxic effects?

A. Produce the symptoms of a phenomenon such as hyperthyroidism.

Q. What is that?

A. That is an abnormal state, produced by excessive amounts of thyroid secretion or thyroid activity.

Q. And how does it manifest itself?

A. In various ways. The first phenomenon that is noticed is weakness and rapid heart action and nervousness, tremors, sweating, sleeplessness, and then loss of weight and strength.

Q. Would the taking of that amount for the period of time which I have indicated in a previous question affect the heart?

A. It would.

Q. In some anatomies?

A. It would.

Q. Would it affect the urine in any way?

A. I do not know as it would affect the urine. No, I do not think it would.

Q. Would it increase the flow of urine?

A. It is apt to increase the flow of urine somewhat, but I am not aware it does any more than that, although severely hypertoxic thyroid patients show kidney damage.

Q. Just what do you mean by—

A. Kidney damage?

Q. No. First, what did you say about toxic?

A. Severely thyroid toxic patients.

Q. That is, those who have taken—

A. Too much thyroid extract.

Q. What would be the kidney damage that would result from that?

A. Thyroid products produce, first, tremendous stimulation of all muscle tissue and all parenchymatous tissues, like the kidneys and liver, the nervous system, the brain. First, there is a long period of stimulation, and then, after stimulation, the organs degenerate, apparently. After being whipped up to overactivitity over a long period of time, then the degeneration takes place.

Q. Might idiocy result?

A. What?

Q. Might idiocy result, I say?

A. No, not idiocy.

Q. Mental weakness?

A. Well, they become irritable and inefficient mentally from over stimulation, but not idiotic.

Q. How about over doses of thyroid for a long period of time creating goiter?

A. Well, it will not create goiter. It will not really create goiter. It does just the opposite to that. It takes the place of the thyroid function, and therefore the thyroid instead of enlarging is apt to recede, if anything. But because you are administering the product of a thyroid manufacture, the thyroid instead of being apt to get larger is apt to recede in its size and no goiter is apt to occur. That word "goiter," of course, is used without its exact sense. We in medicine speak of a goiter as being the enlargement of the thyroid. A lot of people think of goiter as meaning an increased activity of the thyroid. Those are two different things. Goiter is an enlargement, and thyroid extract by mouth would not tend toward producing an enlargement. It would be more apt to do the other thing.

Q. Will it increase the activity of the thyroid gland?

A. No, it takes the place of the thyroid gland. Therefore, the thyroid gland itself would be very apt to quiet down, because you are giving in the doses you mention a dose much larger than the amount of the normal thyroid manufactured per day. Therefore, it does not need to work apparently and would recede, if anything.

Q. And have you had in your practice any experience with a proprietary remedy for obesity called Marmola?

A. Yes, I have.

Q. Give us the details of that experience which you have had?

A. I have never prescribed it, but patients have come, obese patients have come, for instance, or thyroid patients have come to me who have been taking that preparation.

Mr. Gust: Now, if the doctor is speaking from the information that is given to him by the patient—and I assume you are, doctor?

The Witness: Yes.

Mr. Gust: You are speaking from the information that the patient gave you.

The Witness: Yes, that is what the findings of the examination show.

Mr. Gust: As to what you take?

The Witness: Yes.

Mr. Gust: As to what she told you?

The Witness: Yes.

Mr. Gust: I will object to testimony of that nature as being purely hearsay and incompetent, even in this hearing.

Mr. Hornibrook: That is the only way that doctors can obtain knowledge, is through experience. That is the only way they can make a diagnosis, if the Examiner pleases, by inquiry. The only way they can make a diagnosis is by inquiry. They must rely on the statements of the patient. The patient, in the very nature of things, is not going to deceive a doctor to whom he comes for care and treatment. I do not believe this could possibly come under the hearsay rule. All the knowledge that the doctor possesses, if that be true, is hearsay, that which he gets from his books. He is giving an actual experience here. I do not think that the hearsay rule could possibly apply in a case of expert testimony of this kind.

Mr. Gust: If the Court please, the lady or the woman who took the Marmola can testify from first

hand information as to what she did take, and how much she took and what other things she took along with it. I have not any objections to the doctor testifying to the condition as he observed it, but to go further and testify that he was told by this patient that she took Marmola at a certain time or any other remedy, I think, is purely hearsay.

Examiner Averill: Let me hear what the doctor's testimony was up to that point.

(Answer read as above recorded.)

By Examiner Averill:

Q. Now, doctor, when you say patients have come to you who took the preparation Marmola, what means have you of knowing that they had been taking that particular preparation?

A. It just comes out in the history of the patient, that they state they have been taking it.

Q. As given to you?

A. Yes.

Q. When they come to you for treatment?

A. Yes, that is all.

Q. Did you have any other means of ascertaining whether they had or had not been taking it?

A. No, just the statement of a patient and the written history such as is usually obtained.

Q. You mean the written history as written down after they give it to you?

A. Yes.

Q. Not a written history brought to you?

A. Oh, no.

Examiner Averill: You object, as I understand, to the doctor stating anything that was told him by his patient?

Mr. Gust: I object specifically to the doctor stating as to what was told him by the patient as to the drug that the patient had been self administering, if any. That is all up to this time and that is all the doctor had attempted to state of that sort. I say that in so far as the patient told him or told one of his assistants who took the history of the patient, who wrote it down—I assume that is possibly the way the doctor got it, that he has an assistant who takes the patient's so-called history; in other words, interrogates the patient as to what, if anything, has been taken. He writes that down. Then the doctor

reads that later, and he now comes here and is about to state as to what he learned by reading this piece of paper that was written by his assistant from the information that was given to him by the patient. I say that is purely hearsay and not admissible at all in this proceeding. We have no way at all of cross-examining on that.

If the patient were here and testified, then we would be confronted by the person who says, "I took the given drug," Marmola or anything else. We have a method of cross-examining them. We could then inquire into the truth of that statement. But obviously we cannot inquire from the doctor as to the truth of that statement; no means in the world of inquiring from the doctor as to it, because all he knows about it is something his assistant wrote down as told to him by the patient. There is no way of investigating the truth of the statements.

Examiner Averill: It does preclude any examination as to how much of the prescription of the Marmola tablets, what quantity the patient took or for how long a period he or she had been using them. It renders it impossible to ascertain the method or manner in which the patient used the Marmola tablets, and it does seem to be hearsay evidence.

Mr. Hornibrook, I would like to hear you on that matter. It is a very important question.

Mr. Hornibrook: The only thing I can say is to repeat what I have said before. In that confidential relationship that exists between the physician and the patient, considering the vital way in which the patient is interested, and his own welfare, he comes there in trouble, and in the very nature of things he is bound to tell the truth. I do believe that the rule of hearsay cannot apply to expert testimony, where the doctor is giving his experience, an experience which has been adduced, as I say, from that confidential relationship between the physician and his patient.

Counsel complains that he is deprived of the right of being confronted by the witness. He still has the right to cross-examine this witness and show that the doctor's statements are not founded upon anything but hearsay, of course. But I do think that this should go in. I cannot see how a doctor is going to have any knowledge in any way than by this method.

Charles A. Elliott

Examiner Averill: Of course respondent's counsel would have the right to minimize any weight of the testimony that the doctor might give by showing that the doctor's sources of information as to how much and how frequently and how long the patient had been using the Marmola tablets—might minimize the weight of that testimony by his examination of the doctor, but I do not see how he could have the right, which as I understand is given to him, of cross-examining as to the very vital question as to whether the patient about whom the doctor is testifying ever in fact used the Marmola tablets at all, and I should think that would be a very important right to the respondent.

As far as the expert part of the testimony is concerned, I do not see, as far as this particular question is concerned or this particular answer, at least, that that is a question of expert knowledge there at all, that that is simply a statement of a fact on the doctor's part, namely, that he was told or saw in the history as presented to him a statement which said that the patient had been taking Marmola tablets. That is a mere fact that he stated. It is not a question of his deductions. It is not a hypothetical question that has been put to him. On hypothetical questions, of course, involving his expert knowledge, that would be a different matter.

Suppose now for the moment you go on with your examination and let us see what it is going to lead to. I do not think we could take statements of that sort, but let us see what happens.

By Mr. Hornibrook:

Q. Doctor, did those patients who told you that they had been taking Marmola upon your examination have the symptoms of having taken overdoses of thyroid?

Mr. Gust: Do I have to make the specific objection? I object to his including that question that the patient whom he is about to give his expert opinion concerning, told him that he had been taking Marmola.

Examiner Averill: I think that the question there should be: what symptoms did this patient when he examined him or examined her, as the case may be, exhibit; but not as to what the patient told him as to what they had been taking.

Mr. Gust: Yes. But the question assumes a patient who has already told him that he had been taking Marmola. I have no objection to his asking the doctor if he has examined patients and found them with certain symptoms from which he deduced certain conclusions, but I do object to his including in that question the statement that that patient told him he was using Marmola.

Mr. Hornibrook: I am merely using that for the purpose of identifying this particular patient, if the Examiner pleases. Now I want to know if this particular patient who told him he had been using it had the symptoms of taking excessive doses of thyroid. There is no hearsay about that. I am asking him if he had the symptoms of taking excessive doses of thyroid. I am using the word "Marmola" for the purpose of identifying this particular patient. He has already testified about patients who have taken overdoses of thyroid and the symptoms that have developed.

Mr. Gust: That question makes an assumption, assuming that that particular patient took Marmola. That assumption has not been proven here, that witness has not stated so, and that question assumes a state of facts which you have made no effort to prove and therefore I say it is objectionable.

Examiner Averill: Gentlemen, I must sustain the objection to the question in that form.

By Mr. Hornibrook:

Q. Have you any written record of those cases, doctor?

A. You mean patients who have taken Marmola?

Q. Yes.

A. No.

Q. Do you know the names and addresses of any of them?

A. No.

Mr. Hornibrook: I want an exception to the ruling of the Examiner.

Examiner Averill: Yes, sir.

By Mr. Hornibrook:

Q. Doctor, has not the uncontrolled use of thyroid preparations resulted in cases of poisoning?

A. It has.

Q. Has not the use of thyroid preparations demonstrated to physicians, and to you in particular, that they act differently upon the anatomies of the different persons?

Mr. Gust: I do not assume that the doctor is able to testify what is demonstrated to other people, unless somebody has told him that fact, which would also be hearsay.

Examiner Averill: What is the question again?

(Question read as above recorded.)

Examiner Averill: He is asking a simple question. He is asking the doctor now as to whether in his knowledge thyroid preparations act differently upon different people. That is a matter within his expert knowledge.

Mr. Gust: I understood the question not to be "you in particular," but the reporter says that it is, "you in particular."

Mr. Hornibrook: Yes, he has read it correctly.

Mr. Gust: I have no objection to his telling about him himself. I misunderstood the question.

Examiner Averill: Yes. Answer the question.

A. The thyroid has but one action, and that is increasing metabolism. It will increase the metabolism of any person, if taken. Now people have different rates of metabolism. Individuals have different rates of metabolism, some very low, some rapid, very fast. It will increase any of them. If it increases the patient with an already increased rate, it may become a very harmful thing.

By Mr. Hornibrook:

Q. Just what do you mean by metabolism?

A. I expect the explanation of that can best be given by a simile. That is, the thyroid gland has control of the burning of food products and the tissues in the body, like the burning of fuel in a furnace. It acts as the damper of the furnace. If you increase the amount of thyroid given by mouth, the fires burn rapidly, just as though you had opened the damper. With some people who already have a normal or increased rate of burning, if you stimulate them further by giving them more thyroid, then they would burn up not only food but also body tissues in the process. Is that plain?

Q. Yes, to me.

Charles A. Elliott

By Examiner Averill:

Q. But if taken by a person who had a very low rate of metabolism, then the increased rate due to the taking of the thyroid by mouth might not have as great an effect on burning up the tissues as you expressed it would in the first instance, is that the idea?

A. Quite right. Everybody has a different rate. You have a different rate from me. We can measure that accurately. We know by administering thyroid extract by mouth or otherwise that you can increase that rate. Therefore, since people vary so much, it is quite necessary that they shoud be under careful medical supervision and the dose should be accurately determined, so that you may not increase the rate beyond that which is at the normal range.

Q. In other words, a dose which might unduly exite or cause undue activity in one person might only cause a normal and property activity in another, is that right.

A. Thyroid always does the same thing. It does not do different things. Given to a patient with the low rate or high rate, it does the same thing.

Q. It increases it?

A. It increases the burning of the tissues and the food.

Q. Yes.

A. All right. Now, your ideal is to take a person with a low rate, like a cretin, for instance, an idiot, due to thyroid deficiency, or a patient with myxedema due to thyroid deficiency from inflammation, and you feed that patient enough thyroid to set their rate artifically up to normal, then they become normal individuals, with normal reactions. But you give the same amount of thyroid extract to a person who is normal or above normal, you set them way off, beyond what is normal. It produces ill effects then. Is that plain to you?

Examiner Averill: I think I understand. It is the same thing I asked you.

The Witness: Yes, exactly.

By Mr. Hornibrook:

Q. You would say then it is not good practice and unsafe to prescribe the same amount of thyroid for every patient?

A. Do you want my judgment on that?

Q. Yes.

Charles A. Elliott

A. I will say it is criminal.

Mr. Cantwell: I object to that.

Examiner Averill: Object to what?

Mr. Cantwell: To his answer.

Examiner Averill: But that is his answer. The question of how much weight should be given to it is different, but that is his answer. He is asked for his opinion. The value of the opinion is another matter. But I cannot see that any objection should lie to the particular phraseology.

Mr. Hornibrook: Might I have the exhibits?

Mr. Cantwell: That a witness may tell it is criminal, in his opinion?

Examiner Averill: That is his opinion, that is all it is.

Mr. Hornibrook: Might I have the exhibits, Mr. Examiner?

Examiner Averill: Yes, which one?

Mr. Hornibrook: The one showing the formula.

Examiner Averill: Yes, sir.

By Mr. Hornibrook:

Q. Doctor, examining Commission's Exhibit No. 4, being the formula for Marmola, I will ask you to state whether or no it is not a fact that there are three physics of laxatives designated there.

A. Yes, I think there are.

Q. Name them, please.

A. Cascara sagrada is one. Phenolphthalein is another. I think that extract of bladderwrack would act as a cathartic. I am not so sure of that.

Q. How about extract of phytolacca?

A. There is an alterative and I think it is a cathartic, though I m not sure about that.

Q. Doctor, I will ask you to note in the column to the extreme left the amount of the different physics.

A. Yes.

Q. Now, assuming that prescription was given, four tablets a day for a period of sixty to ninety days, would that in your opinion be apt to create what is known as the laxative habit in a patient?

A. Yes, it would.

Q. Doctor, should not the heart and the urine be examined before giving thyroid in any quantity?

A. Not only the heart and the urine, but the patient generally.

Q. And during a thyroid treatment should a patient not be examined at intervals?

A. Oh, yes, he ought to be under continuous or certainly occasional medical supervision.

Q. How often should he be under medical supervision?

A. Once a week anyway, in taking thyroid.

Q. What does the taking of thyroid accomplish? In the first instance, does it build up muscle or destroy muscle?

A. It does just one thing. Thyroid extract does just one thing. It increases matabolism. All right, that means it increases the breaking down by oxidizing processes. You oxidize food tissue, all tissues. Yes, it breaks down tissues.

Q. And muscular tissue as well as fat?

A. More particularly muscle tissue than fat.

Q. So that a statement that the taking of thyroid or a tablet containing thyroid would build up muscle while at the same time reduce fat is not true, is that the fact?

A. It is not true.

Q. Doctor, in your experience, how small a dose of thyroid will sometimes cause nervousness?

A. A very small dose in some patients. A fourth of a grain twice a day, to my knowledge, has done that frequently.

Q. How small a dose in your experience or to your knowledge has caused toxic poisoning?

A. You see, the question is not a good one, because it does just one thing, and that is it increases matabolism. If you give them a small dose, it increases just that much, or a big dose that much more, so it is pretty hard to say. The increase may not be what you would call toxic. It may be physiological. In a cretin you give a dose of thyroid enough to produce physiologically a proper amount of metabolism, a proper rate.

Q. What would you say about a dose of a half a grain a day four times a day, amounting to two grains, for a period of from sixty to ninety days? Would that be apt to produce toxic poisoning?

A. Oh, yes. It is more than the normal amount of thyroid material that is secreted probably in a day, considerably more.

Q. And might it produce other effects, bad effects?

A. Oh, yes.

Q. And what might they be?

A. The effect of increased matabolism on any of the

organisms of the body, on the brain, on the eyes, on the muscles, on the heart, any organs, it would produce a toxic effect as comes about by increased stimulation. The principal effects, of course, are mostly on the heart and muscle system, although the nervous apparatus is secondary.

Q. Doctor, you have now studied Commission's Exhibit 4, being the formula from which Marmola is prepared, have you?

A. Yes.

Q. Assuming that that is given four times a day, over a period, say, from sixty to ninety days, I will ask you to state whether or no that preparation is the result of and is based upon scientific research, knowledge and accuracy.

A. In my judgment?

Q. Yes.

A. No.

Q. I will ask you to state, bearing in mind in all of these questions the same assumption, whether or no in your opinion its medical properties are safe, pleasant and effective in their action in the removal of excess flesh from the human body.

A. It is very unsafe.

Q. I will ask you to state, still bearing in mind the formula and the directions, whether or no in your opinion the same may be used by purchasers thereof without discomfort, inconvenience or danger of harmful results to the physical health of such users of said compound.

A. In my opinion, it cannot be given without danger to the patient.

Mr. Connor: Without what?

The Witness: Without being dangerous to the person who takes it.

By Mr. Hornbrook:

Q. I will ask you to state, doctor, whether the giving of Marmola in the dosage of two grains a day is a scientific method for the treatment of obesity.

A. No. In my judgment, it is not.

Q. I will ask you to state, doctor, whether that formula given in the dosage as I have already indicated will act with a reasonable degree of uniformity upon the bodies of all users thereof?

A. No. It would depend upon their metabolic rate.

Q. I will ask you to state whether it will be sufficient to be generally effective for the reduction of the excess flesh of the users thereof without impairing the health of a substantial portion of such users and without the danger of bringing to such substantial portions injurious results to physical health.

A. It would impair the health of many of them, in my judgment.

Q. I will ask you to state whether that may be safely used by any individual purchaser thereof without previous consultation with a medical adviser.

A. In my judgment, it is not safe.

Q. I will put that question again and add a little more to it. I will ask you to state whether it may safely be used by any individual purchaser thereof without previous consultation with a competent medical adviser and reliance upon his continuing observation and advice.

A. I think it is not safe, save under those conditions.

Q. Is not this the fact, doctor, that thyroid when introduced in the human body is a powerful agent, liable at all times to produce radical changes of conditions that will be harmful to the user thereof?

A. It is.

Q. And is not this true, that such harmful changes may safely be guarded against in any case only by the previous and continuing investigation, observation and advice of a competent physician?

A. It is.

Q. Doctor, is not this a fact: That even the use of thyroid for the reduction of excess flesh under the directions of a competent physician is fraught with possible injury and calls for constant professional observation, medical skill and care?

A. It certainly does.

Q. Doctor, what do you think of these directions as applied to Marmola, whether or no it is safe or not: "This treatment should be faithfully taken as directed, for sixty to ninety days"?

A. As indicated before, I do not think that is safe.

Q. What do you think of this: "Stop when you are satisfied. Then if you start to gain again, take Marmola a while longer"?

A. I think that is dangerous also.

Q. "Try not to miss a dose, for the cumulative effects are important." Is that dangerous or otherwise?

A. Cumulative effects are dangerous. The cumulative effects of thyroid extracts are certainly dangerous.

Charles A. Elliott

Q. Is there any rule, doctor, that applies to all persons, as to the number of pounds per day which can be safely removed from a patient in a process or a treatment of reduction?

A. I think not. It is a mighty serious thing, and I think in medicine we are just realizing that, that reduction must be undertaken as an individual problem with each patient.

Q. Where with one person it might be safe to reduce a couple of pounds a day, with another person it might not be safe to reduce a half a pound, is that the fact?

A. That is a fact. Of course, we have seen results of that thing on account of this craze for reducing in the last few years. I do not mean by this preparation at all, but by women who want to reduce.

Q. Is the consensus of opinion to this effect among physicians, doctor; that the dosage recommended for Marmola, if taken regularly, seems best fitted to the average case?

Mr. Gust: I object to the doctor giving the consensus of opinion among physicians. Obviously, he could only get it by physicians giving it to him. I have no objection to his giving his own opinion.

By Mr. Hornibrook:

Q. Give your own opinion then, doctor.

Examiner Averill: Will you read that question that was objected to?

(Record read as above recorded.)

Examiner Averill: Gentlemen, the objection to that question in that form is sustained. There is nothing to show so far that the doctor has attended any convention or conclave or consultation of physicians in connection with the use of Marmola.

By Mr. Hornibrook:

Q. Doctor, in your opinion, is the use of Marmola, under the directions which I have heretofore indicated, the best fitted remedy to suit the average case of obesity?

A. No. I think—do you want to know what I think about it?

Q. Yes.

A. I think it is a very unscientific way of reducing the patient's weight. I think it should be done under dietitic control and metabolic control and so on.

Charles A. Elliott

Q. Doctor, is the use of Marmola alone in cases of obesity a scientific remedy?

A. No, sir.

Q. Looking at Commission's Exhibit 4, being the formula for Marmola, and noting the directions there, four tablets a day, I will ask you to state whether or not that is a scientific method for treating obesity.

A. No, it is not.

Q. Right there, is there any difference between thyroid extract and desiccated thyroid?

A. Yes.

Q. What is it?

A. Desiccated thyroid is the dried gland. Thyroid extract is where it has been extracted by various processes, alcohol and water.

Q. What is usually the treatment for obesity?

A. Thyroid extract. Oh, for obesity?

Q. Yes.

A. Either. They may both be prescribed.

Q. They both have the same effect, have they?

A. Yes.

Q. One is dry and the other is—

A. They are both dry.

Q. They both come from the same source, do they not?

A. Yes.

Q. What is the source?

A. The thyroid gland of animals, calves mostly.

Q. There really is no difference then, so far as the effect upon the human body is concerned, between thyroid extracts and desiccated thyroid?

A. No.

By Examiner Averill:

Q. Would there be any difference between the one-half—I think it is a half there—

A. Yes, a half grain.

Q. (Continuing)—a half grain of desiccated thyroid and a half grain of this thyroid extract you speak of?

A. Yes. The different batches vary very much, your Honor.

Q. But what I mean is, in the extract form—

A. The extract form is more potent than the desiccated thyroid.

Q. It would be more potent?

A. Yes.

Charles A. Elliott

Q. Your testimony a while ago, as I understood it, was to the effect that that quantity, namely, a half a grain of thyroid extract would do thus and so. Now, if I was correct in understanding you, what difference, if any, would it make in your testimony if instead of using the thyroid extract you used a half a grain of desiccated thyroid per tablet?

A. None.

Q. None?

A. No.

By Mr. Hornibrook:

Q. Right there, doctor, has all of your testimony with reference to this formula been predicated upon the knowledge that it contained one-half grain of desiccated thyroid?

A. Yes, although I think I stated before thyroid extract, because that is the common preparation that is used.

Q. But in all your testimony you have referred and had in mind and your conclusions have been predicated upon this desiccated thyroid in the quantities as shown in the formula, Commission's Exhibit 4, is that the fact?

A. Yes.

Q. Doctor, then you say increased vitality always comes with the taking of thyroid.

A. It acts as a powerful stimulant?

Q. Would you say that the taking of thyroid in one half grain doses, four times a day, for a short period of sixty or ninety days would increase vitality as a general proposition?

A. No. At first it would stimulate the patient; later they would be over-stimulated.

Q. By stimulation you don't mean any increase in the vitality do you?

A. I do not.

Mr. Hornibrook: You may take the witness.

Examiner Averill: Just before these gentlemen start there is one question I would like to ask the doctor.

Q. Doctor, will a preparation compounded in accordance with the formula given in Commission's Exhibit 4, if taken four times a day for a period of from sixty to ninety days have a tendency to reduce obesity?

A. Yes.

Charles A. Elliott

Q. Will the tendency be rapid or slow, or gradual?

A. May I explain that a little bit?

Q. Yes, sir.

A. You see assuming that a patient is on a standard diet or a weighed diet, that bodily activity was standardized, then there would be a reduction in weight inversely proportionate to the amount of food taken and in proportion to the amount of exercise.

Does that answer your question?

Q. I suppose so, doctor.

A. I tried to.

Q. I am very much obliged to you. Your first answer answered that, but I say that the question as to whether it was rapid or slow or medium tendency to reduction would all depend on so many other factors which would have to be known.

A. That is quite right.

Examiner Averill: I see.

Mr. Hornibrook: Just one more question before you take the witness, please.

Q. Doctor, when you put a patient on a thyroid treatment do you prescribe a diet?

A. Always.

Q. Always? What would you say of this, doctor, as applied to Marmola; "It reduces fat by correcting the gland cause with out abnormal exercise or diet"? Would that be a correct and proper treatment for obesity?

A. I think not.

Q. I will ask you, doctor, whether it is proper and safe during the treatment for obesity involving the use of thyroid to prescribe the same diet for all people?

A. It is not.

Q. You sometimes prescribe exercise along with the treatment, do you?

A. Oh, yes.

Q. Is it safe and proper to prescribe the same exercise and the same amount of exercise for all people during that treatment?

A. It is not. It is an individual thing.

Mr. Hornibrook: You may take the witness.

Cross-examination by Mr. Gust:

Q. Doctor, I understood you to say that you used in your practice thyroid extract?

A. Yes, sir.
Q. Also desiccated thyroid?
A. Yes.
Q. You had occasion to use the preparation prepared by Parke Davis & Company of Detroit?
A. Yes.
Q. Their desiccated thyroid is a well recognized preparation?
A. Yes.
Q. Used by you?
A. Yes.
Q. How long has this desiccated thyroid been used by physicians?
A. Let me explain just a little, may I?
Q. Yes.
A. Desiccated thyroid as I understand it, is just the dry gland, thyroid gland. We ordinarily use the thyroid extract, which is a dried preparation, as well; and we have used a great deal of different kinds. Ordinarily we use the Armour preparation. I am not so sure but what the Parke Davis is not an Armour preparation.
Q. You are not so sure of it?
A. Of what it is. They get it from Armours.
Q. I see.

Examiner Averill: I assume by that you mean they get the original material from which the preparation is made, is that the idea?

The Witness: Yes, sir. I am not sure of that but I think that is true.

Examiner Averill: Because as I understand you it is made from the glands of animals.

The Witness: Yes.

By Mr. Gust:

Q. I show you a bottle—
A. Armour and Company.
Q. (Continuing)—which purports to be thyroid?
A. Yes.
Q. Do you know whether that is desiccated thyroid or thyroid extract?
A. Well, sir, I am not sure.
Q. I assume that would be filled by the druggist, from that bottle, if you wrote a prescription for thyroid U. S. P.
A. I think it would.
Q. I think it would be?

A. I think it would.

Mr. Gust: Perhaps I ought to have that marked.

Examiner Averill: It depends upon what is to be done with it.

The Witness: Thyroid tablets.

Mr. Gust: Have you any objection to my having that marked?

Examiner Averill: You have no objection to its being marked?

Mr. Hornibrook: No.

Examiner Averill: Are you going to offer it as an exhibit?

Mr. Gust: I will offer it as an exhibit.

Examiner Averill: He refers to the bottle concerning which the witness has just been questioned. Any objection?

Mr. Hornibrook: None.

Examiner Averill: Same will be received in evidence and marked Respondent's Exhibit No. 1.

(Which document was received in evidence and marked Respondent's Exhibit No. 1.)

By Mr. Gust:

Q. Respondent's Exhibit No. 1, doctor, is a bottle of tablets put out by Armour & Company, as I understand it, and it purports to contain two grains of thyroid?

A. Yes, sir, thyroid tissue.

Q. Whether it is desiccated thyroid or thyroid extracts, as I understand it, you are not quite sure?

A. I am not sure.

Q. But that is a bottle that is sold generally in the drug store?

A. It is.

Q. And can be purchased at practically any drug store in the City of Chicago?

A. It can.

Q. And those tablets contain, so they state, two grains of thyroid, is that true?

A. That is right.

Q. And the dosage indicated on the bottle is what?

A. There is no dosage on it.

Q. What does that say at the bottom, "Dose—"

A. Oh, yes. "One to two tablets."

Q. That can be bought from the drug store without any doctor's prescription?

Charles A. Elliott

Mr. Hornibrook: Wait a minute. Wait a minute. How can this witness tell whether it can be bought from the drug store without any prescription?

Mr. Gust: I don't know.

Mr. Hornibrook: We object to that as calling for a conclusion from the witness and not proper cross-examination.

Examiner Averill: Doctor, of course, in answer to that question if you don't know, you just say you don't know. If you do know, you can state.

The Witness: I really don't know whether people can buy this directly or not.

Examiner Averill: You mean you don't know whether it is obtainable without a prescription or not.

The Witness: I don't.

By Mr. Gust:

Q. Now, the giving of thyroid, as I understand it, doctor, as you say, has only one effect on the human body?

A. It has.

Q. And that is that it increases metabolism?

A. It does.

Q. By increasing metabolism it increases the oxidizing which goes on in the body?

A. Right.

Q. And the persons who takes it looses weight thereby?

A. Yes.

Q. And that effect is universal on the patients?

A. It is.

Q. Now, how long have they been using this thyroid in the medical profession?

A. Well, for many years, I know.

Q. Would you undertake to say how long?

A. Well, I suspect for twenty years. I am not sure of the exact time, but I think somewhere around there.

Q. It is a comparatively new drug then, is it?

A. In that sense.

Q. In that sense, in the sense it has been used only twenty years where most of your other drugs have been used much longer than that, is that right?

A. Yes; probably longer than that.

Q. How long have you been using it yourself?

A. Well, I have been using it at least twenty years.

Q. And you use it in reducing fat people do you?

A. No.

Q. You don't?

A. Well, not, no.

Q. You don't use it for that?

A. No.

Q. You don't use it in conjunction with other things in reducing fat people?

A. I think we have used it perhaps, although secondary to dietetic control.

Q. But you do use it for that purpose in conjunction with dietetic control?

A. Let me explain. I think I have used it in years gone by but I don't use it now for that purpose.

Q. I see.

A. To reduce fat. But you can do it mathematically and scientifically by controlling diet and exercise in normal patients. Now, if a patient is abnormal, if they have a cretinism or myxedema or a very low metabolic rating without demonstrable myxedema, for instance, I think it would be a desirable thing to use.

Q. Do you know of any other drug that you use in the treatment of obesity?

A. Don't use any drugs.

Q. Don't use any?

A. No, not ordinarily.

Q. You do nothing but control diet?

A. Diet and exercise.

Q. In your own practice?

A. Yes.

Q. Diet and exercise?

A. Yes. It can be done mathematically under those circumstances it can be done mathematically, exact.

Q. How long does it take to reduce by your method?

A. That depends on the individual patient.

Q. Yes.

A. You can start by starvation, for instance, you can get the maximum effect, and at every gradation from a slight reduction in diet to a point of starvation an effect can be obtained.

Q. I understand that. You said that it depends upon the individual case. How about the average normal case?

A. Well, that again is a matter of mighty good judgment to control the diet and determine the amount of—rapidity of reduction that you want to institute?

Q. How long would it take the average normal case to reduce, by your method?

A. You can reduce safely perhaps ten pounds a month.

Q. Now, you increase the rate of metabolism, do you, by your method of diet and exercise?

A. No.

Q. Doesn't the exercise increase the rate of metabolism?

A. Well, yes, exercise will increase the rate of metabolism of course.

Q. If you did not increase the rate of metabolism you would not get any reduction?

A. Oh, yes. You can cut off the food to get reduction without increasing metabolism. If you increase exercise then you do burn up the food products more rapidly.

Q. And you do not control the metabolism of any particular part of the body by your methods, do you?

A. That is, of course, metabolism applies to the whole body.

Q. Metabolism applies to the whole body?

A. Doesn't apply to any particular part of the body.

Q. So when you increase the rate of metabolism you simply cause the patient to burn up more of his own tissues and bodily content.

A. Right.

Q. And the first result as I understand it in your opinion from the administration of thyroid is stimulation?

A. It is.

Q. A person who is fat, obese, ordinarily has a low rate of metabolism, does he not?

A. A normal rate.

Q. They have normal rates?

A. They have normal rates, the average, the normal person, who is obese has a normal rate.

Q. A normal rate of metabolism?

A. Yes, sir.

Q. And if you increase that rate in a normal person who is fat and overweight he will commence to lose flesh, lose weight?

A. Yes, assuming that the amount of food that he consumes is uniform.

Q. Assuming that he does not increase his food or decrease his exercise, that he takes thyroid extract and has proper elimination, he will lose weight?

A. He will.

Q. The normal person?

A. He will.

Q. Of course, he might offset that action by eating far more than he had ever eaten before, might he not?

A. He might.

Q. Or he might decrease—he.

A. He would, he would.

Q. Yes. Or he might decrease his loss of flesh by not taking any exercise at all?

Examiner Averill: Might decrease?

Mr. Gust: I mean he might decrease the loss of flesh he might otherwise obtain if he did not take any exercise.

The Witness: He would.

By Mr. Gust:

Q. But I am assuming that he remains in substantially the same condition as before, I mean that he does substantially the same things by way of exercise and eating. Then if he takes thyroid extract he will lose weight?

A. He will.

Q. And he will lose it because he increases his rate of metabolism?

A. He will.

Q. He will obtain that result no matter how he obtains the thyroid, whether he obtains it in Marmola or from this bottle of Armour's or the doctor's prescription?

A. He will.

Q. So far as his obtaining that result, then, of loss of weight it is immaterial whether it be administered the thyroid be administered by yourself or some other doctor, or whether he obtains it from the drug store?

A. The result would be—the result of reducing weight would occur if he takes the thyroid, no matter from what source he gets it.

Q. In other words it is the same thyroid?

A. Same thyroid.

Q. Going to have the same effect?

A. It will.

Q. But you think he ought not to take thyroid except under the directions of some physician?

A. I do, indeed.

Q. And you think he ought not to take most drugs except under the direction of a physician is that so.

A. Of course.

Q. You think that self-medication is a bad thing?

A. I think it is a bad thing, when that medication may be toxic.

Q. Well, there are a few drugs that can be taken into the human body without toxic effect.

A. Why?

Q. If they are continued long enough. Isn't that so?

A. I don't know of any drug that has a physiological, pharmalogical action but if taken indiscriminately would produce toxic effects, do you?

Q. No, I don't know. I am just asking you, doctor. I assume that is so?

A. That is so.

Q. If you continue any drug?

A. Any drug that has an action, that is not inert, will produce effects, toxic effects.

Q. And therefore you as a physician think that people ought not to—

A. Take drugs.

Q. (Continuing)—take self-medication, is that right?

A. That is right.

Q. You take a remedy such as castor oil, if self-administered in the proper case may bring harmful results, isn't that right? Maybe I should have said improper case?

A. Improper case, will produce harmful effects. Yes. sure.

Q. In cases of appendicitis and typhoid, the self-administration of castor oil may produce very harmful effects, on a patient.

A. It certainly may.

Q. Now, as I understand you said that self-administration of thyroid over a long period of time would cause certain symptoms?

A. It does. The administration, under any circumstances, whether it is self or otherwise administered will produce a physiological effect.

Q. You mean by that, symptoms?

A. Symptoms.

Q. As the ordinary layman understands, would produce symptoms?

A. It does.

Q. And those are symptoms which the patient can observe for himself, can he not?

A. Not always.

Q. Well, they are subjective symptoms?

A. Not always.

Q. Not always?

A. He would not be aware of an increased metabolic rate for instance.

Q. No, but that alone—

A. That is what you depend upon. That is what you get from using thyroid tablets.

Q. He would be aware of it if he lost some flesh. He might not name it that way, but he would be aware he lost flesh, would he not?

A. Probably would.

Q. He might not deduce the scientific name that his metabolic rate had been increased, but that is what he would understand in simple language from his own observation, would he not?

A. Loss of weight and other things.

Q. Yes, but we are taking loss of weight alone, for a minute?

A. Yes.

Q. That means that the metabolic rate has been increased?

A. Yes, sir.

Q. I say he is aware then, although he may not know how to name it that his metabolic rate has been increased?

A. Yes, sir.

Q. So he is aware of the result but he doesn't know the name of it. Now, he would be aware of a more rapid heart action?

A. Very apt to be.

Q. Apt to be aware of it? You also said, I believe, that the administration of thyroid over a long period of time might cause nervousness in some patients?

A. It does.

Q. He would be aware of that fact?

A. Yes.

Q. And you also said that it might cause in some patients tremors?

A. It does.

Q. And that is something he would be aware of?

A. Yes.

Q. And I believe you also said that it might cause sweating?

A. Yes.

Q. And that again is something that the patient would be aware of?

A. Yes.

Q. And I believe you said it might cause sleeplessness, is that right?

A. Yes.

Q. And that is something again the patient would be aware of?

A. Yes.

Q. Certainly very much aware of? So that all of the symptoms that you say develop from the use of thyroid over a long period of time in some patients are conditions which are subjective?

A. No, not at all.

Q. Which he would be aware of?

A. There are objective.

Q. Well, maybe—

A. They are objective. Most of them are objective.

Q. You mean by objective that you could—

A. Anybody.

Q. Anybody looking at him could ascertain them, is that it?

A. I don't mean that exactly. I mean this, that the effects of taking thyroid are such that— they may be so gross that a patient may be aware of them. Some of the effects are not discernible except by instruments of precision, such as doctors would employ for instance.

Q. Well, doctor, I may not understand. I am a lawyer. This is a subject that I have to get from you medical men?

A. Yes.

Q. But it seems to be quite evident that he would be aware of his rapid heart or his tremors or his sleeplessness or his nervousness or his sweating without any instruments of precision or any doctor or any other layman advising him about it. Isn't that so?

A. I think he would if they were marked.

Q. If they were marked?

A. Yes.

Q. I suppose those symptoms would be disagreeable under certain circumstances?

A. Yes, I imagine they would.

Q. And I assume that it is your experience if the patient obtains disagreeable symptoms from any medicine he quits taking it?

A. Hyper-thyroid patients usually come to a doctor.

Q. Hyper-thyroid patients usually come to a doctor?

A. They do.

Q. But I asked you if it was not your experience that people who experience these disagreeable symptoms ordinarily stop taking the medicine.

A. I don't know.

Q. You don't know?

A. They would be very foolish if they did not.

Q. Don't you think they would stop taking the medicine and then go to the doctor, both?

A. They often times do that too.

Q. Well, doctor, is there a dose, an average dose, of thyroid stated in the U. S. P?

A. I think there is?

Q. Do you know what it is?

A. No. But we know very well that the dose of thyroid extract or effective thyroid substance that is taken will produce a definite mathematical result. So that the dose that is administered varies with every patient; the dose that should be administered varies with different patients.

Q. There is, however, an average dose for the average person, Doctor?

A. Healthy person?

Q. Yes, the average person.

A. You don't—

Q. The average person who is not suffering from any definite disease?

A. I wouldn't give it, give no dose.

Q. Well, there is an average dose for every drug that is listed in the U. S. P. is there not?

A. I think so.

Q. What is that in this case? Isn't it one grain?

A. I don't know.

Q. Your answer is you don't know about that?

A. My answer is I don't know, that it varies with every patient; that you can produce the results you want by increasing or decreasing the dose. Some patients would need twenty grains a day and another one one grain a day.

Q. A person who is suffering from excess fat or obese undertakes to reduce that flesh by diet control, he ought to go to a physician or a doctor?

A. I think it would be wise if he did it. Or he may be an intelligent man. I think he can reduce his diet and do it safely if he is intelligent and uses common sense.

Q. A restricted diet unsupervised by doctors may produce in him harmful results?

A. It certainly may.

Q. It certainly may. And likewise if he undertakes to reduce by violent exercise without medical supervision it may produce harmful results?

A. It may.

Q. It may. So that your idea as a medical man is that a patient ought to consult a physician in those cases?

A. Yes.

Q. And not undertake to self-administer either foods, drugs or exercise, is that true?

A. That is true, where they are really obese.

Q. Yes. Now, these disagreeable symptoms of nervousness, tremor, rapid heart, you have seen follow the administration of thyroid all disappear with the stopping of the drug?

A. Soon thereafter.

Q. Very soon thereafter?

A. Four or five days, six days.

Q. I see. I assume that a man who undertakes violent exercise, such as running gets the symptoms of a rapid heart?

A. Yes.

Q. And he also gets tremors?

A. Yes.

Q. And he also gets sweating?

A. Yes.

Q. And he may also suffer from sleeplessness?

A. Yes.

Q. If he indulges in it too much?

A. Yes.

Q. And if he continues to run, nevertheless, he is going to cause himself harm?

A. Yes.

Q. The ordinary man under those circumstances stops running, does he not?

A. Yes.

Q. And then his symptoms disagreeable symptoms, disappear, he gets back to normal?

A. Yes.

Q. Doctor, I believe you spoke about the effect of taking phenolphthalein and cascara in quantities are present in this prescription tablet, as might produce the chronic cathartic habit, is that it?

A. Yes.

Q. In all people you think it would do that, necessarily?

A. No, not necessarily so. In many people it would.

Q. If it would they would get the same result from any carthartic they took for the same length of time, probably?

A. I imagine so; I imagine so.

Q. Now, some people have idiosyncrasies for particular drugs?

A. Yes.

Q. That is well recognized in the medical profession?

A. Yes.

Q. What are the usual examples of those drugs?

A. Having idiosyncrasies?

Q. Yes.

A. Oh, I think the most common one the doctors come up against is the use of morphine. Some patients given a very small dose of morphine, one-eight of a grain become tremendously excited, nervous. Another person with the same amount will go to sleep, have quite a nice sleep.

Q. Take quinine. Some people have an idiosyncrasy for quinine?

A. Yes, sir, very much.

Q. But they are not the normal, average person are they?

A. Seem otherwise normal.

Q. They seem otherwise normal, but it is not the normal thing or the average thing to find a person with the idiosyncrasy for quinine?

A. No.

Q. That is an unusual thing, as people generally go?

A. Oh, yes. It—

Q. It may be entirely common with doctors, but considering people generally it is not the average case?

A. It is not.

Q. Well, of course there is neither of those drugs present, neither morphine nor quinine present in this formula that has been submitted to you, exhibit 4?

A. I think not.

Q. Some people have idiosyncrasies for particular foods?

A. They do.

Q. Strawberries, for instance?

A. Yes.

Q. Tomatoes?

A. Yes.

Q. And for other foods?

A. Yes.

Q. And those particular people have bad results from eating those foods?

A. Yes.

Q. They have disagreeable symptoms?

A. They do.

Q. But they are not, again, the average person or the average case?

A. No, they are not.

Q. They are not? You in your own private practice check the metabolic rates of the patients to which you administer thyroid?

A. Yes, sir.

Q. You administer thyroid before you had that method to check?

A. I don't know; I don't think so.

Q. How long have you been able to check them?

A. The metabolic rates?

Q. The metabolic rates.

A. About six or eight years. More than that, ten years, perhaps.

Q. But you have been using thyroid for upwards of twenty?

A. Yes, in treatments. That is what I have in mind. I am not sure when the thyroid extracts for cretinism came into medical use, but that is perhaps twenty years ago, and it has been used universally for treatment all that time, long before metabolic rate determinations were made.

Q. And there are a great many practitioners who don't have access to the machine necessary to check the metabolic rate?

A. We all have access in the city.

Q. In the cities, but in the smaller communities, they don't have access to such complicated apparatus?

A. That is right.

Q. And they, I assume, have the same problems to combat you do?

A. Yes.

Q. And they have to get along without this modern, scientific machine that you use?

A. They can do it pretty well.

Q. They do it, by observing these symptoms you have talked about?

A. The effects, yes, sir.

Q. And they do it, you say, pretty well?

A. It seems so.

Q. So it is not then an absolutely essential apparatus to have in the administration of thyroid?

A. No, it is not absolutely essential.

Q. It is just one of the modern conveniences, so to speak, which you city practitioners enjoy?

A. No, I wouldn't put it that way. It is more than that. I think in an occasional case it would be impossible to determine whether their rate—whether they were getting too much thyroid, for instance, or not, save by the metabolic rate determination. And under those circumstances the country doctor not accessible to such rate apparatus would be a great disadvantage.

Q. Doctor, I assume your opinions and ideas about thyroid medication have been changing from time to time?

A. I think they have, to some extent.

Q. To some extent. In fact, the opinions of the medical profession and yourself in particular is changing from time to time on most subjects, isn't that true?

A. Well, as far as the thyroid is concerned the use of thyroid preparations it has become standardized now. But during the years we knew little about it our opinions did change. I think that is the way it is with most subjects in medicine. At first when you don't know exactly how to handle, how to administer the preparation, the opinions change from time to time.

Q. It is generally in a state of flux, so to speak?

A. I wouldn't say that.

Q. No.

A. No. We know what the thyroid does not and our opinions and our practice doesn't change, as far as that is concerned. And that is true of any therepeutic measures when we know exactly how to use it, why, we use it pretty generally without any change of opinion.

Q. Yes, but it often happens when you think you know and you subsequently change, isn't that true?

A. Oh, yes, sure enough.

Q. So that while you say you know you are not prepared to say that you will not change?

A. That is true.

Q. You say that a small dose of thyroid as one quarter of a grain twice a day, frequently injured people?

A. I would say this: That that amount of thyroid substance would increase the metabolic rate of any patient and in some individuals that would be a harmful thing.

Q. Some obese people?

A. Yes.

Q. What percentage of obese people do you think would be injured by that small a dose?

A. I can't give you—I can't state. I don't believe a very high percentage would be definitely harmed by that amount.

Q. You would not want to make it any more definite than that? That you don't believe?

A. I would leave it indefinite, because each case is individual.

Q. Then again, some people would not be injured by a much larger dose?

A. That is true.

Q. How large a dose?

A. How lare a dose would injure anyone?

Q. How large a dose do you think could be taken by people without injuring them?

A. I think any dose that would increase their rate above normal would be injurious for that individual.

Q. How far above normal rate of metabolism do you think it ought to be before it is injurious?

A. Will be injurious?

Q. Injurious?

A. Well, I think that the increasing the rate ten per cent would be injurious.

Q. How large a dose of thyroid do you think would be necessary to do that?

A. Depends upon the individual case.

Q. Well, the average obese person?

A. Well, the average normally obese person?

Q. Yes.

A. Not a pathological state. I think that—well, one grain a day continuously would be injurious to the average normally obese person.

Q. What do you mean by continuously?

A. They take it right along, and if they stop it in three or four days it all stops.

Q. In other words, if they got disagreeable symptoms and stopped, of course that would end it?

A. That would end it.

Q. If in spite of those disagreeable symptoms they continued to take it—?

A. It would be injurious.

Q. The symptoms would get worse?

A. Yes, sir.

Q. Is that it? Well, do yon know, doctor, of any large group of persons not obese that took much larger doses of thyroid continuously, like the group Dr. Plummer reported, without any injurious results?

A. If Dr. Plummer reported any large group of patients taking large doses of thyroid without injury?

Q. You don't know of any such?

A. I do not.

Q. You don't know of your own knowledge of any such group of persons that have taken it, is that it, in any way?

A. In a large group no.

Q. Without harm, we would say?

A. No. Henry Plummer.

Q. I mean Dr. Plummer?

A. Henry Plummer.

Q. He is a well recognized authority?

A. Yes.

Mr. Hornibrook: Might I ask a question?

Mr. Gust: Sure.

By Mr. Hornibrook:

Q. Does Dr. Plummer live in Chicago?

A. No, he is a native of Minnesota, a small town about twenty miles from Rochester. He is a graduate of Northwestern Medical School, in 1898.

Q. Classmate of yours?

A. Classmate of mine, and been in Mayo Clinic since about 1900, 1901.

By Mr. Gust.

Q. Doctor, you have talked about this scientific nature of this remedy, thyroid as a remedy?

A. Yes, sir.

Q. Do you, as a physician, know how the results are obtained from using extract of thyroid?

A. What do you mean by that?

Q. I mean to say that you administer thyroid and you observe certain results?

A. Yes, sir.

Q. Do you know how those are brought about what action goes on in the human body that brings that about?

A. Yes,—

Q. You do?

A. And no. We know that it increases the oxygen change, the processes that go on with burning.

Q. Well, how and why does it do that?

A. Well, do you want an explanation of that thing? It probably has its effect on every cell in the body.

Q. What does it do to that cell?

A. It increases its activity, metabolic activity.

Q. How does it do it?

A. God knows; nobody else.

Q. Why does it do it?

A. Nobody knows.

Q. Nobody knows?

A. It does that thing.

Q. It is after all imperceptible, is it not?

A. No.

Q. You administer it and observe results?

A. No, very scientific, very exact.

Q. Do you think something is scientific you don't know how or why it happens?

A. Yes, sir. There is nothing ever happens that the ultimate explanation is known.

Q. I say; you don't know how or why of anything.

A. I don't know why or how the stars go round. I know they do certain things. And we know that thyroid extract does certain things in the body.

Q. You know how or why a gasoline engine works, don't you?

A. I don't know so much about gasoline engines.

Q. Some people do. I was just trying to get your idea of what you meant when you said scientific. That is all, doctor.

A. All right.

That is an understanding of the method of or the action in this instance, of thyroid extract or thyroid substance.

Q. I don't know as I quite understood that.

A. An understanding of the method of action in this specific case of effective thyroid cells. For instance, we know that by taking that in the mouth it is absorbed as thyroid material, effective thyroid material from the intestines. We know it goes into the blood stream and we know it affects all cells where blood comes in contact with this blood, nerve cells, muscle cells—every cell. And we know as a result of that action that it increases the amount of oxygen; that is, that the oxygeniation, oxygen consumption is increased; the burning is increased, is what I mean, of every cell.

Q. Well, it is suggested that that is simply knowing results, that you know the results, but how or why it so happens you are unable to state.

A. Unfortunately that is all we know here below, is the results.

Q. On this subject?

A. Any subject.

Q. But you do know that it increases the metabolic rate?

A. Metabolic rate?

Q. Metabolic rate?

A. Increases oxygen consumption.

Q. Do you know how much it increases the administration of one or two grains a day would increase the average rate of the average person?

A. Well, the administration of two grains a day to the average, normal individual of average height and weight to administer that continuously it would shoot their metabolic rate up perhaps 15—20 points, per centage.

Mr. Gust: I think that is all. You may take the witness.

Mr. Hornibrook: I don't have one question, I believe to ask the doctor.

Redirect Examination by Mr. Hornibrook:

Q. I want to clear up your phrases. What do you mean, doctor, by hypo-thyroid patients?

A. Well, a hypo-thyroid patient is one in whom the thyroid activity is below normal. That is expressed mathematically by percentage of methabolic rate. We consider metabolic rate from minus to plus ten, minus ten to plus ten, as being normal. The hypo-thyroid patient would be one that would be below minus ten per cent.

Q. The hyper?

A. The hyper-thyroid patient would be one that would be above plus ten per cent.

Q. Now, there is one more question I think I will ask you. I believe you testified that you do not use thyroid for reducing fat without a dietetic control?

A. Dietetic, yes, sir.

Q. Why is that?

A. Well, because a patient on a weighed diet—that is, I mean on an exact diet, they are eating an exact amount and kind of food each day, will maintain themselves on a certain level of weight. You reduce the intake of food, effective food and you will reduce the weight proportionately, mathematically. Increase the weight and you will increase the weight mathematically, if other factors are uniform, such as for instance, physical exercise or mental exercise, worry and such things.

Is that plain?

Mr. Hornibrook: Yes, it is to me.

In order to make my record with reference to the matter which was ruled out by the Examiner I would like to make an offer at this time.

Examiner Averill: Yes, sir.

Mr. Hornibrook: I offer to prove by this witness that at one time a patient came to his office who told him that she had been taking, he or she, Marmola, and that upon examination the doctor found symptoms of over dosage of thyroid.

That is the offer.

Examiner Averill: That is the offer. I see. An objection was sustained to that. He just wanted to make it clear in the record, what he offered to prove.

Mr. Gust: I understand.

Examiner Averill: The proof, gentlemen, along those lines is rejected.

Mr. Hornibrook: Exception.

Examiner Averill: Yes, sir.

Mr. Hornibrook: That is all, doctor.

Mr. Gust: I think that is all.

(Witness excused.)

Mr. Hornibrook: May it not be stipulated that Commission's Exhibit marked for identification 9 containing 107 samples purported samples, of Respondent's advertising are in fact true samples of the advertising respondent used, used by it in different newspapers and magazines throughout the United States?

Mr. Gust: That is true. As we explained the other day, not all of those advertisements appeared in any paper. Some one of them has appeared in some paper. I mean all of them have appeared in some paper.

Mr. Hornibrook: That is all we want. If that might be stipulated.

Mr. Gust: Yes.

Mr. Hornibrook: We offer this in evidence as Commission's Exhibit No. 9.

Examiner Averill: Any objection to the introduction of that?

Mr. Gust: No.

Examiner Averill: One moment. The papers in question, gentlemen, as stated by counsel will be received in evidence and marked as Commission's Exhibit No. 9.

(Said document was thereupon received in evidence and marked Commission's Exhibit No. 9.)

Mr. Hornibrook: Mr. Examiner, I ask that these be marked as Commission's Exhibits 10, 11 and 12 for identification.

I now ask the attorneys for the respondent whether they will stipulate whether Commission's Exhibits 10, 11 and 12 are samples of advertisements of the Raladam Company and the old Marmola Company and that they appeared in the magazines and upon the dates marked in pencil or pen, as these pencil and pen marks appear on these exhibits.

Mr. Gust: Well, insofar as they relate to the Raladam I can't tell whether they appeared on that date, without checking it through on the records.

Mr. Hornibrook: Then I will have to put Doctor Cramp on the stand.

Mr. Gust: I guess that is what we had better do.

Mr. Hornibrook: I will ask that Dr. Cramp be sworn.

Mr. Gust: As far as these dates are concerned, I am quite willing to admit as far as these Raladam advertisements are concerned—

(Discussion off the record.)

Examiner Averill: Gentlemen, there being no objection the two papers heretofore marked Commission's Exhibits 11 and 12, for identification will be received in evidence and marked Commission's Exhibits 11 and 12, respectively. The same being as I understand, according to this stipulation advertising matter issued by the Raladam Company the respondent in this cause? Is that correct?

Mr. Gust: That is correct.

Mr. Hornibrook: That is correct.

Examiner Averill: All right, go ahead.

Mr. Gust: Now, Exhibit 10, marked for identification, purports to contain four sample copies of advertising. Two of them on their face show that they are advertisement of the old Marmola Company. The other two I am willing to stipulate.

(Discussion off record.)

Examiner Averill: Gentlemen, as far as the offer that is now made of the paper heretofore marked Commission's Exhibit 10 for identification it appearing from the

Charles A. Elliott Arthur J. Cramp

statement of counsel that two of the advertisements contained on this sheet are advertisements which were published under the auspices of the Marmola Company, which is not a respondent in this case, but which the evidence shows was the predecessor of the present Raladam Company. I shall reserve ruling on the admission of those two advertisements until the testimony is further developed and then shall bring the matter to the attention of counsel and take it up and make a ruling at that time on the admission of the two advertisements inserted by the Marmola Company. As to the two advertisements inserted by the respondent, they will be received and marked Commission's Exhibit No. 10.

(Whereupon said documents were received in evidence and marked Commission's Exhibit No. 10.)

Whereupon an adjournment was taken until ten o'clock, July 26, A. D. 1928.

Docket No. 1496
Chicago, July 26, 1928.

Met pursuant to adjournment, 10:00 o'clock A. M.

Before:

Edward M. Averill, Examiner.

Appearances:

Edward J. Hornibrook (Washington, D. C.) for the Federal Trade Commission.

Rockwell T. Gust, 2214 First National Bank Building, Detroit, Michigan; R. M. Connor, 560 Equity Building, Detroit, Michigan, Robert E. Cantwell, Jr., 1105 Hartford Building, Chicago Illinois, attorneys for the Respondent.

ARTHUR J. CRAMP was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct Examination by Mr. Hornibrook:

Q. State your name?
A. Arthur J. Cramp.
Q. Where is your office, Dr. Cramp?
A. With the American Medical Association at 525 North Dearborn Street, Chicago.
Q. Are you connected with that Association?
A. I am.

Q. In what capacity?

A. I am director of what is known as the Bureau of Investigation of the American Medical Association.

Q. Have you conducted an investigation to ascertain whether or no there are anti-fat or obesity remedies and cures on the market?

A. I have.

Q. Have you prepared a list with reference to that?

A. I have.

Q. Are there such concerns?

A. There are.

Q. Read into the record there from your memorandum who they are and where they are located?

A. I should preface the reading of this list with the statement that it is very incomplete. It was merely made out within the last two days from more recent inquiries that we have received regarding the particular products that are named in this list. It does not pretend to be in any sense of the word a complete list of the anti-fat remedies that are on the American market today. That list is a very much larger one.

Q. After that explanation, doctor, you might read into the record what you have?

A. Dr. Kalen's Reducing Capsules, marketed by Gray's Laboratories, New York.

Venus Reducing Cream, by Landin Company, Chicago.

Pyro-Pine Reducing Bath, by Peerless Products Company, Chicago.

Obesi-Tea by Obesi-Tea Incorporated, New York.

P. B. C. T. Capsules, by P. B. C. T. Laboratories, Chicago.

Rite-Wate Fat Reducer, by Star Sales Company, Inc., Detroit.

Neutroids, by Graham Sanitarium, Inc., New York.

Silph, by Silph Company, New York City.

Sangrina, by Sangrina Company, New York.

Dr. R. Newman, New York.

Nature's Way Reducing Cream, Chicago.

Sa-Bu-Tea, Cleveland, Ohio.

Thin-O-Vals, by T. O. V. Co., New York.

Normo Tablets, Durex Company, Chicago.

Eureka Reducing Cream, Duncan, Okla.

Browning's Reducing Mints, Hollywood, California.

Phytanine, French Importing Company, New York City.

Fayro, Fayro Laboratories, Pittsburgh.

Q. Do you know whether those are now on the market?

A. It is my belief that all of them are on the market.

Q. Have you recently endeavored to purchase some anti-fat remedies or obesity remedies and cures?

A. Yes.

Q. What success did you have?

A. I went into four drug stores in the loop.

Q. In the loop of Chicago?

A. In the loop of Chicago, yes. And purchased the A. D. S. Obesity treatment.

Q. Manufactured where?

A. Manufactured by the American Druggist Syndicate of New York. I purchased Rite-Wate Fat Reducer, distributed by the Star Sales Company of Detroit. I purchased Gaveck Tablets, a reducing tonic manufactured by the Gaveck Company of Chicago. I purchased Sangrina; distributed by the Scientific Research Laboratories of New York City. I purchased Silph, distributed by the Circle Wholesale Drug Company of New York City. I had offered a package of Neutroids, but they wanted $6.00 for it and it did not seem worth while to waste that much money, so I did not buy it.

Q. Do all of those articles which you purchased purport to be anti-fat remedies or cures or obesity remedies or cures?

A. None of them of course profess to be cures, because manufactures of proprietary remedies are very careful to avoid the word "cure." They are all recommended as treatment for obesity.

Q. Yes.

A. Which to the public means essentially the same thing.

Mr. Hornibrook: That is all.

Mr. Cantwell: We object to what it means to the public. He is not qualified to say that.

Examiner Averill: Your motion is to strike from the answer that portion of the answer in which the witness says, "which means to the public."

Mr. Cantwell: Yes.

Mr. Hornibrook: That may go out.

Examiner Averill: Motion to strike is granted.

Mr. Hornibrook: I might say to counsel for the respondent at this time that I have a witness, Dr. Woodyatt, who is a very busy man, and if you will oblige me by letting Dr. Cramp stand aside and then

taking up your cross-examination of him later on it would be a great favor to Dr. Woodyatt.

Mr. Gust: Perfectly agreeable.

Examiner Averill: All right, gentlemen.

(Witness temporarily withdrawn.)

ROLLIN TURNER WOODYATT, was thereupon called as a witness and having been duly sworn, testified as follows:

Direct Examination by Mr. Hornibrook:

Q. State your name to the reporter, Doctor?
A. Rollin Turner Woodyatt.
Q. Where is your office?
A. 104 South Michigan.
Q. And what is your occupation?
A. Physician.
Q. How long have you been a physician?
A. Since 1902.
Q. You are what is known as a regular physician?
A. Yes.
Q. From what school did you graduate?
A. Rush Medical College.
Q. You have the degree of M. D?
A. Yes.
Q. Any other degree?
A. D. S.
Q. Have you taken any post graduate work?
A. Yes.
Q. Where?
A. University of Chicago, New York, Germany.
Q. How old a man are you, doctor?
A. 50.
Q. And how long have you been practicing your profession?
A. Since 1902.
Q. Is your practice extensive?
A. I should say yes.
Q. Do you specialize in any particular branch?
A. I work especially in metabolism, make a specialty of internal medicine.
Q. Are you connected with any schools?
A. Yes.
Q. Medical schools?

A. Yes.

Q. What schools?

A. University of Chicago, Rush Medical College.

Q. In what capacity?

A. I am at the present time Chairman of the Department of Medicine of Rush Medical College.

Q. How long have you been such chairman?

A. A year and a half.

Q. Have you held other chairs or professorships in the past?

A. Yes.

Q. Where were they?

A. I have been a clinical professor or a professor of medicine of Rush Medical College for ten years.

Mr. Hornibrook: Might I have the Commission's Exhibit showing the formula there, please?

Examiner Averill: Certainly.

Mr. Hornibrook: Will you place that in front of the doctor, please?

Examiner Averill: Yes, sir.

By Mr. Hornibrook:

Q. Doctor, are you familiar with the drug known as desiccated thyroid?

A. Yes.

Q. I have now placed before you for reference Commission's Exhibit 4, purporting to be the formula of the remedy known as Marmola. I will ask you to examine that.

A. Yes.

Q. You have looked at it, have you?

A. I have looked at it now, and I looked at it before.

Q. Do you use thyroid in your practice?

A. Yes, at times I do.

Q. For how long a period of time have you used it?

A. Oh, upwards of twenty years.

Q. Are you familiar with its action on the human body?

A. Yes.

Q. Will you note on the formula there—and if what I say is not correct, you correct me—an ingredient of one half grain of desiccated thyroid. You note that, do you?

A. Yes.

Q. I will ask you to state that, doctor, whether or no thyroid is a dangerous medicine?

Mr. Gust: If the examiner pleases, I object to that question. It is calling for a conclusion of the doctor, without defining what he means by dangerous.

Examiner Averill: Well, that can be brought out later?

Mr. Connor: It is also leading.

Examiner Averill: He asked whether or no in his opinion the remedy called thyroid is dangerous? Now, I take it that the doctor can answer that and he may answer either unqualifiedly or he may qualify it. He can explain it later. That will all come out. The objection is overruled. Go ahead.

By Mr. Hornibrook:

Q. And I will add to the question. Under certain conditions.

A. Thyroid extract is a remedy that has to be given in known amounts under known conditions, by people who know its actions and dangers that might result from an overdosage.

Q. Now, after having examined Commission's Exhibit 4 and noting that there is an ingredient there of one half grain of desiccated thyroid, I will ask you to state, doctor, whether the administration of Marmola to a person of four doses a day, that is, three times after each meal and one time before retiring, for a period of sixty to ninety days, is fraught with danger to the patient to whom it is administered?

A. It would undoubtedly produce toxic symptoms in a certain percentage of the people who took it under those directions.

Q. And what are toxic symptoms?

A. We speak of toxic symptoms to indicate symptoms of poisoning from a drug or other substance.

Q. And how do they manifest themselves?

A. When a patient is receiving a little too much thyroid extract he complains usually of a rapid pulse. He may have unpleasant sensations in his head. If he has a sufficient overdose, he may have tremors, sweating, diarrohea or even a delirium.

Q. May that amount of thyroid taken without the directions of a physician or physicians prove injurious to the patients?

A. Yes, in my opinion that could prove injurious. I should never myself prescribe that dose without having the patient under very close observation.

Q. Now, when a patient comes to you in such a condition that your first judgment is that it is a patient who requires thyroid, what examination do you make, what do you go through, before you administer this thyroid drug, with reference to the examination of the patient?

A. My own practice in that respect might differ a little from the average of other physicians. I personally very seldom give thyroid extract, unless they have a basal metabolic rate that is definitely below the normal. I personally very seldom give thyroid extract unless I have a patient on a quantitative diet. I never give thyroid extract in a prescription to a patient unless the patient is under immediate observation, so that if toxic symptoms appear I will know about them very soon and be able to stop the extract; and I always instruct the patient as to what the earliest symptoms of too much thyroid might be.

Q. During the administration of the thyroid drug by you how often do you require them to appear for observation?

A. That might differ, but beginning the injection or beginning the administration of thyroid with a new patient I would not ordinarily let them go without telephoning or appearing more than three or four days at the outside.

Q. What would you say, doctor, about administering thirty-six of these Marmola tablets, they being made from the formula before you there marked Commission's Exhibit 4, four times a day, continuously?

A. You mean giving thirty-six four times a day?

Q. Oh, no. Giving the whole thirty-six continuously, but the dosage being four times a day?

A. That would be nine days running?

Q. Yes.

A. Well, I have never given this material, but if I gave too much thyroid I would expect a certain percentage of toxic symptoms.

Q. What do you say about this statement, doctor: Will thyroid reduce fat and at the same time increase muscular tissues?

A. Pardon me. I did not get that.

Rollin Turner Woodyatt

Mr. Hornibrook: Will you read that to the witness please, Mr. Reporter.

(Question read as above recorded.)

A. No, the thyroid extract alone could not do that.

By Mr. Hornibrook:

Q. Does the administration of thyroid in overdoses affect the heart?

A. Yes.

Q. How does it affect the heart?

A. It makes it beat very rapidly.

Q. What other organs of the body do overdoses of thyroid affect, if any?

A. The central nervous system, the bowels.

Q. Would it cause exhaustion and nervousness?

A. Yes.

Q. Has not the uncontrolled use of thyroid preparations resulted in poisoning?

A. I am not familiar with specific instances of uncontrolled use, but even under controlled use it has caused poisoning, yes.

Q. Doctor, examining Commission's Exhibit 4 again, is it not a fact that there are two or at least two physics or cathartics or laxatives set forth there?

A. I see two. The extract of cascara sagrada and phenolphthalein.

Q. Would the administration of these tablets containing those two laxatives in the quantities as there indicated for a period of, say sixty to ninety days, or, rather, might it create what is known as the laxative habit in a patient?

A. I do not believe it would do just that. It might irritate the bowel. I think what is called the laxative habit is a habit that results from relieving and existant constipation by a laxative and resorting to that means, but I do not believe the giving of a laxative very often establishes a habit, unless there is some underlying condition to begin with.

Q. Might it not then leave the constipated condition about which you speak?

A. It might irritate the bowel so that after the use of it the bowel would not normally act, so that then the persons' tendency might be to again take a laxative. The term "constipation" is used differently. The laity ordinarily mean any condition in which the bowel does not empty itself on time or completely. Specialists ordi-

narily speak of constipation in which there is a hard, dry stool. What the average man means by constipation is very often a state of irritated bowel, in which the rythmic movement of the bowel is imperfect so that he does not obtain satisfactory emptying of the bowel, but many times that is due more to irritation than to a hard, dry stool.

By Examiner Averill:

Q. Doctor, I note you use the term "thyroid extract." Do you draw any distinction between thyroid extract and desiccated thyroid?

A. No.

By Mr. Hornibrook:

Q. In the treatment of obesity, doctor, is it not a fact that one person may require a little and another person a great amount of food and that therefore in prescribing a diet the advice of a physician should be had?

A. Personally, I have never had a case of obesity without a quantitative diet. With the quantitative diet I sometimes use thyroid, desiccated thyroid or thyroid extract, as a supplemental measure.

Q. Just what do you mean, doctor, by quantitative diet?

A. I mean a weighed and measured diet, so that we know how many calories the patient is receiving in a day, approximately, and how much carbo-hydrate, protein and fat.

Q. Is it not a fact that one person can take more thyroid than another without injurious effects?

A. Yes, that is true.

Q. So that in some instances a quarter of a grain a day would be injurious, wouldn't it, given continuously for a period, of, say, thirty or forty days?

A. Yes, out of a community of people there would be certain ones who already had a tendency towards hyperthyroidism, to whom any thyroid extract would be superfluous and probably, insofar as it had any effect, injurious; and if it were a case of incipient goiter it might be flared up by the administration of too much thyroid.

Q. And as the thyroid was increased, say, up to two grains a day the danger would increase?

A. In proportion to the dose.

Q. Yes.

A. Other things being equal.

Rollin Turner Woodyatt

Q. Doctor, looking again at the formula, I will ask you to state if Marmola will act with a reasonable degree of uniformity upon the bodies of all the users of it?

A. No, it would necessarily differ in different cases.

Q. I will ask you to state whether it would be sufficient to be generally effective for the reduction of excess flesh of the users there of without imperiling the health of a substantial portion of such users and without danger of bringing to such substantial portion injuries resulting to physical health, requiring the service of skillful physicians, successfully to neutralize or counteract such injurious results?

A. Before I reply to that may I ask you a question?

Q. Yes.

A. Do you want just a brief positive or negative answer at this point?

Q. Yes.

A. Or do you want it elaborated?

Q. Just a positive answer at this time. I don't know, doctor. Go ahead and answer the question the way you like the way you prefer.

A. May I ask you to just repeat that question and I will make my answer as brief as possible.

Mr. Hornibrook: Read the question, please.
(Question read as above recorded.)

A. I should say that the indiscriminate use of a preparation having this formula by people unfamiliar with medical principles would result in serious results in a certain proportion of cases.

By Mr. Hornibrook:

Q. Would you say that the preparation Marmola may be safely used by any individual without previous consultation with a competent medical adviser and reliance upon his continuing observation and advice?

A. I would say it would not be advisable or entirely safe to do that.

Q. Is this not the fact, doctor: That thyroid, when introduced into the human body, is a powerful agent, liable at all times to produce radical changes of conditions that will be harmful to the user thereof?

A. If used in too large quantities.

Q. Is this not the fact, doctor. That such harmful changes may safely be guarded against in any case only

by the previous and continuing investigation, observation and advice of a competent physician?

A. Yes, or anyone sufficiently trained so that he is, in effect, in that case a physician. A patient might be trained to use it. He would not be a physician, but he would have the necessary training at that time given to him by a physician.

Q. What do you say as to this; doctor: the right rule is to take Marmola until you reach normality?

A. You ask me what I would say about that?

Q. Yes.

A. I would say that that would increase the amount that was taken and the returns to the company if the directions were followed.

Q. How might it affect the patient, doctor?

A. It might result in his continuing to take it after he had already too much of it.

Q. It might result very seriously to the patient, might it not?

A. If he followed the directions.

Q. What do you say to this: "Try not to miss a dose of Marmola, for the cumulative effects are important." What is your opinion of that?

A. I would say that the cumulative effects might be important, but not necessarily a reason for taking more.

Q. They might be injurious, might they not?

A. Might be a good reason for stopping.

Q. Doctor, are you able to state what the concensus of opinion in your profession is as to this proposition: That the dosage directed, to-wit, two grains a day, seems to best fit the average case?

A. All I can say about that is for the last twenty years I have made a rather continuous and intensive study of various disorders of the metabolism and that I never have or never would think of prescribing extract in that way for any of them.

Q. You think it would be dangerous to do so?

A. It would be dangerous in some cases; ineffective in others.

Q. Yes.

A. The worst thing about it is that it would not educate the public as to the correct, sound methods of handling their conditions. It is empirical and not based on reason and the knowledge of physiology and pathology, which I would think was more important, taking the community at large, than some of the individual accidents might be.

Rollin Turner Woodyatt

Q. Doctor, is the taking of Marmola as directed by Commission's Exhibit 4 a scientific way for treating obesity?

A. Have I exhibit 4 here?

Q. Yes, you have exhibit 4 right before you.

A. There are no directions on this.

Q. Then assuming that the directions are to take it once after each meal and once before going to bed, until the patient has reached normality.

Mr. Cantwell: I object to that as not being the full directions, Mr. Examiner.

Examiner Averill: That is his premise now that he is stating. Of course, when it comes to cross-examination you can ask him how it would affect the patient under those circumstances.

Mr. Cantwell: I withdraw the objection then.

Examiner Averill: But now he is asking under this particular, identical condition.

Mr. Hornibrook: I would like to have the question read.

(Question read as above recorded.)

The Witness: The question is what?

By Mr. Hornibrook:

Q. Is that a scientific method of treating obesity?

A. No.

Q. Doctor, I wish you would define for us the term "metabolism"?

A. From birth to death we are always taking into the body at intervals, air, water, foods from the outside world, and at intervals we are always returning to the outside world the same materials in altered form. Between the time when they enter the body and the time when they leave it in altered form, they go through an elaborate set of chemical changes which have to do with growth, the development of the body and organs and all that we call the life of processes of the body. The term "metabolism" is applied to all of those chemical and physio-chemical changes that take place in the body between the time when the materials from the outside enter the body and the time when they finally get back to the outside world.

Mr. Hornibrook: You may take the witness.

Examiner Averill: Just a minute. Let me ask a question there.

By Examiner Averill:

Q. Doctor, stated in the layman's way, would this be a correct or semi-correct, anyway, view of it; that this metabolism you speak of is the building up and tearing down or breaking down of the cell tissues throughout the various portions of the body?

A. Yes, that is approximately correct.

Q. In other words, certain things are consumed and certain things as a result of that consumption are built up or build up whether as a result or not?

A. Yes, sir. I think perhaps for practical purposes the simplest parallel is that of an automobile. An automobile produces power and heat. It takes in fuel in the form of gasoline. It discharges the remains of that fuel in the form of carbondioxide and smoke. What happens to the gasoline between the time it enters the machine and the time it is thrown out would be the gasoline metabolism. Metabolism also includes such changes as might take place in the oil or in the wearing of parts and the repairing of parts.

Examiner Averill: Thank you, that was all I wanted to know.

Cross-examination by Mr. Gust:

Q. Doctor, you say that you have in your practice had occasion from time to time to prescribe desiccated thyroid?

A. Yes.

Q. Are you familiar with the desiccated thyroid as prepared by Parke Davis & Company of Detroit?

A. I believe I have used that preparation. Here in Chicago I more commonly use the Armour.

Q. Is the preparation as prepared by Parke Davis a recognized standard preparation, doctor?

A. The Parke Davis people have a very high reputation.

Q. Their products are recognized and used by the medical profession?

A. Yes.

Q. Generally without question, are they not?

A. No, not necessarily without question. Parke Davis & Company have made slips.

Q. So have the medical profession, haven't they, doctor?

A. Yes, sir.

Q. Is this the preparation you referred to as Armour's preparation? (Handing bottle to the witness.)

Examiner Averill: Referring to Respondent's Exhibit 1?

A. Yes, this seems to be.

Mr. Hornibrook: Just a moment. What was that?

Examiner Averill: The doctor testified he used Armour's and he asked him whether that was it.

The Witness: It seems to be one of them, I said.

By Mr. Gust:

Q. Does it seem to be the one that you have used?

A. They make different sized tablets. This tablet is a two grain tablet. I have used that preparation.

Q. Have you used it in the treatment of obesity?

A. Yes, in connection with the treatment of obesity I have used it.

Q. You did that to reduce the patients in weight?

A. I did it to increase the rate of metabolism.

Q. From that it followed that the patient did reduce in weight?

A. Not from that alone, no.

Q. Well, in conjunction with diet and exercise and elimination?

A. If you are giving a man a certain number of calories in the form of food and if the man is expending in energy more calories than he receives, he must ordinarily lose weight or lose flesh. He might lose flesh and not lose weight, if he accumulated a great deal of water, but when I say weight in this sense I mean flesh.

Q. If an obese person or patient continues to take the same amount of calories into his his system and continues to take the same amount of exercise and you administer thyroid, that patient will lose weight, will he not?

A. Not necessarily.

Q. The administration of thyroid will increase the rate of metabolism?

A. Yes, more or less depending on the amount given and the individual.

Q. And if it increases metabolism and there is no more intake and if there is the same amount of exercise, he will lose weight?

A. Not necessarily.

Q. Not necessarily?

A. No. Because he might be still gaining weight under those conditions.

Q. The average obese person who is otherwise normal under those conditions would lose weight, doctor, would he not?

A. Not necessarily. You have not stated the whole number of conditions which would determine a weight loss.

Q. What other conditions would have to be present for him to lose weight? Put it that way.

A. His metabolism would have to be increased over and above any intake or fuel form of food that he was getting. The fact he was having a constant diet and constant exercise and a constant dosage of thyroid would not mean that he was, even at that, exceeding his intake or his output of energy.

Q. In that case you would have to administer more thyroid?

A. You would have to raise his metabolism until his expenditure exceeded his supply.

Q. And you do that by administering more thyroid?

A. You could ordinarily raise his metabolism so that it would exceed the supply, especially if you made the supply sufficiently low. You can make the supply lower than the output by lowering the supply sufficiently low without giving any thyroid extract.

Q. Yes.

A. Always, in every case.

Q. You can always make your patients lose weight by simply reducing the intake?

A. Yes, sir, always.

Q. Without injury to health?

A. I did not say that.

Q. No, but I am asking you?

A. If a man is starved to death he loses weight.

Q. That is not my question, doctor. What—

A. If you starved him to death you have done him injury.

Q. You could do him injury before you would starve him to death, couldn't you?

A. There are cases—to be frank, to answer what you are after—there are cases of obesity due to certain causes, that is, there are certain types of obesity in which it is very difficult and frequently dangerous to attempt to reduce weight very much by any means that we have at our disposal today.

Q. You mean to say, there are cases of obesity in which it is not safe to reduce diet?

A. Try to reduce.

Q. Try to reduce the diet?

A. On which all physicians are agreed that it is difficult to accomplish anything without running into danger with the patient.

Q. What I am trying to ask you doctor, and I think you probably have answered it, but I do not quite understand you, is this: That there are obese patients in which it is dangerous to reduce their diet substantially, is not that true?

A. Below certain limits.

Q. Below certain limits?

A. Yes, I think so.

Q. What is the dosage of thyroid stated in the U. S. P?

A. I have not read it recently and could not tell you.

Q. You do not recall what it was at any time?

A. I do not base my own practice on what it states in the book, but on direct experiments.

Q. I understand, but the question is, do you know what the dosage stated in the U. S. P. is?

A. I am not prepared to state without looking it up. If you tell me what it is I can —

Q. I am going to say I think it is one and one-half grains. I would rather have your statement on that than mine.

A. I have not looked it up. It is merely a matter of looking at the book and seeing.

Q. Doctor, would that refresh your memory? (Handing book to witness.)

Now, doctor, I am not asking you to state what it says there, but I am asking you to answer it—

A. Just a moment.

Q. I am not asking you to state what it says there, but I am asking you if that so refreshed your memory, so that you are able to tell.

A. It refreshes my memory to this extent: It says, "If used in thyroid deficiency, that deficiency, dosage six one-hundredths of a gram, or one grain, U. S. P."

Q. These thyroid tablets, such as Armour's tablets may be purchased in any ordinary drug store without a prescription, may they not?

Mr. Hornibrook: Wait a minute.

A. I do not—

Mr. Hornibrook: Just a minute. That is objected to as calling for a conclusion of the witness. The witness could not know that.

Examiner Averill: I did not catch his objection? (Record read as recorded.)

Mr. Hornibrook: It is not proper cross-examination. In the very nature of things the witness could not know that.

Examiner Averill: I think he can say he either knows or does not know. If he does not know he can so state.

Mr. Hornibrook: You might ask him whether he knows or not. That might be proper, but to ask him whether he knows they do, that is not.

Examiner Averill: I think the doctor can say in response to the question whether he knows or not. If he does not, he can tell us. He may answer.

A. I know that some druggists would not, and I do not think any druggist should. What they actually do in Chicago, I do not know, in general.

By Mr. Gust:

Q. Doctor, all drugs which have any effect on the human system if used in sufficient quantities, produce what you medical men term toxic symptoms, do they?

A. That is practically always true, not always only of drugs but even of substances known as foods.

Q. What foods?

A. Salt.

Q. What others?

A. Mustard.

Q. Name some more if they come to your mind readily?

A. Sugar, meat, fat, bread.

Q. That is also true, as I understand it, of drugs likewise?

A. Yes, the difference between a physiological effect and a toxic effect is always relative to the dose.

Q. Some people have idiosyncrasies as to certain foods and certain drugs, is not that right?

A. They do, yes.

Q. And that food or that drug produces a toxic effect on them much more quickly in smaller doses than in people who we may term normal?

A. Yes.

Q. Or average?

A. Yes.

Q. On the other hand, some people acquire a tolerance of certain drugs or certain foods?

A. Yes.

Q. Where there is tolerance some people can take much larger doses than the normal, average person without producing any toxic effect?

A. Certainly. As one case, in the case of alcohol.

Q. And that is true of not alone alcohol, is it?

A. It is not necessarily true in general. Some drugs have a more delerterious effect after they have been taken for a while than they did when you first began with them, a persons tolerance being broken down by their use.

Q. You are speaking of an individual person whose tolerance might be—

A. No, I am speaking of certain drugs.

Q. Of certain drugs?

A. Yes.

Q. You spoke about the inflammation of the bowels that might be produced by the continued taking of laxatives of cathartics?

A. I used the term "irritation."

Q. What did I say?

A. "Inflammation," I understood you to say.

Q. I meant to say "irritation."

A. Yes.

Q. I suppose if a man takes bran continuously it may produce that irritation?

A. He may.

Q. And he may produce it with any cathartic is that right?

A. With most cathartics.

Q. Is this cascara supposed to be a less irritant than others?

A. It is not so irritating as some. It is more irritating than others. It is one of the milder, lesser irritating ones.

Q. One of the most common laxatives that you prescribe, is it not, doctor?

A. I do not prescribe a great many laxatives.

Q. I do not mean you personally, but I mean the profession generally, if you know?

A. Yes, it is one of the common laxatives. One never prescribes laxatives for obesity.

Q. What do they prescribe?

A. For obesity?

Q. Yes.

A. Carefully study the case and try to determine the cause of obesity in that case, and usually manage it according to the diagnosis. Diet is one of the basic factors.

Q. You reduce the so-called fat forming foods?

A. Reduce the caloric intake below the caloric output.

Mr. Gust: That is all.

Mr. Hornibrook: Just a few questions, doctor.

Redirect Examination by Mr. Hornibrook:

Q. You said, I believe, that you sometimes gave two grains of thyroid at a dose, that you had done so?

A. I do not believe I said so. I am willing to say that I have though.

Q. But you did not do so, doctor, did you, until after careful examination of the patient and a very careful observation of the patient afterwards, did you?

A. No, sir, and I never began in any patient with such a dose.

Q. Would you begin a patient with a dose of two grains a day?

A. I would never begin with that dose.

Q. If you gave thyroid at all you would start in with a moderate dose?

A. Watch the patient and work up cautiously.

Q. That is the general practice among physicians, is it?

A. That is the best practice among physicians.

Q. You do not use thyroid as a treatment for obesity at all, do you?

A. Some forms of obesity are benefitted by the use of thyroid, along with the other measures you take very definitely.

Q. But you do not use that as an exclusive treatment?

A. No.

Q. For obesity?

A. By no means.

Rollin Turner Woodyatt

Q. You would use it in connection with exercise and diet if it was necessary at all?

A. Yes.

Q. Or better?

A. And in connection with cases in which we have some reason to believe that there is a thyroid deficiency at the bottom of the obesity or contributing to it.

Q. Now, is not this a fact; that sometimes you use thyroid in cases of obesity where the metabolism, due to reduction and exercise has become a hardship on the patient and that you administer moderate doses of thyroid in order to accomplish the reduction and do away with that hardship?

A. Reduce the rigor of the regime?

Q. Yes.

A. Yes, sir.

Q. But then it is only administered after careful examination and observation of the patient, is that the fact?

A. That is the fact with me.

Q. Now, you were asked to examine a little red book entitled "Epitome of the United States Pharmoeopea and National Formulae" and you were directed to look at page 179 to ascertain the dosage of thyroid, is that a fact?

A. I did not note the page number.

Q. Well, that is the page number?

A. Yes, this is the page I looked at a moment ago.

Q. Page 179?

A. Yes.

Q. I will ask you to read into the record what is said there under the title "Thyroidin" or "thyroid"?

A. It says, "Thyroid U. S. P. Thyroidin siccum—" that means dry"—U. S. P. 9. Desiccated thyroid glands; the thyroid glands of domesticated animals which are used for food by man, free from connective tissue and fat; dried and powdered. Contains about 0.2 per cent of iodine." Do you want more?

Q. Yes.

A. "A yellowish powder with a slight characteristic odor. Action and uses: Used in thyroid deficiency; sometimes in obesity in which it may be harmful dosage 0.06 grams (one grain), (U. S. P.)."

Mr. Hornibrook: That is all.

Mr. Gust: That is all.

Examiner Averill: Thank you, doctor.

(Witness excused.)

Arthur Crump

ARTHUR CRUMP, resumed the stand and testified further as follows:

Mr. Hornibrook: Will you read the last question and answer of this witness?

(Record read as above recorded.)

Mr. Hornibrook: You may take the witness.

I might say here too, that while I have stated that you may take the witness for cross-examination on this subject, I may recall the doctor later on for some other things. I do not want to be precluded from recalling him later on.

Mr. Gust: Then I would like to defer my cross-examination until such time as you develop everything that you want.

Mr. Hornibrook: I may not recall him. The only purpose that I may have in recalling him is possibly for the identification of some advertising matter.

Examiner Averill: Off the record.

(Discussion outside the record.)

Cross-examination by Mr. Connor:

Q. Dr. Cramp, you exhibited a list here that you read into the record?

A. Yes.

Mr. Connor: I believe the list was not introduced as an exhibit.

Examiner Averill: No. He just read it in.

Mr. Connor: He just read it in here?

Examiner Averill: He had it to keep the names before him, that was all.

Mr. Connor: To read in the record?

Examiner Averill: Yes.

By Mr. Connor:

Q. Where did you get this list?

A. I made it.

Q. When did you make it?

A. Day before yesterday.

Q. What did you make it from?

A. The file that we have in the Bureau of Investigation.

Q. A file?

A. And from letters that have been received inquir-

ing about these different products. Letters that have come since the first of January, 1927.

Q. When you say "we" you mean the Medical Association?

A. Yes.

Q. So you compiled this list from the files and records of the Medical Association?

A. Correct.

Q. Do you of your personal knowledge know how many, if any, of these concerns are now in business, and how many, if any, are not in business?

A. Well, all I can say is, of course, that these products that I purchased are from concerns that presumably are still in business.

Q. Leave out the word "presumably" and answer my question as I put it. Do you know of your own personal knowledge, how many, if any, of the names contained in this list that you read into the record are still in business, and how many, if any, are not now in business?

A. Of my own knowledge, no.

Q. To pick out from the articles that you purchased I see one here marked Sanerina?

A. Yes.

Q. Do you know that Sanerina—I cannot read it. I have not my glasses?

A. It is distributed by the Scientific Research Laboratories.

Q. Do you know whether they are now in business or not?

A. I do not.

Q. Do you know or don't you know that a fraud order was issued by the United States Post Office Department and they went out of business two years ago.

A. I know that a fraud order was issued against them for the sale of that product through the mails. This was purchased in a drug store.

Q. You do not know whether they went out of business.

A. I do not know whether they went out of business.

Q. You do not know whether they did or not.

A. My impression is that they did not.

Q. But you do not know?

A. I do not know.

Q. And the same question with reference to Silph?

A. Silph?

Q. You do not know whether they are in business or not?

A. No, this was purchased in Chicago two days ago.

Q. You know that articles may be on a druggists shelves for years and years and years, don't you?

A. That is true.

Q. And after they have gone out of business the articles are still on the druggists' shelves?

A. That may be true.

Q. You have already stated—there is no use of my asking you—that you have no personal knowledge about any of these?

A. In this sense, that I very naturally have never visited any one of these concerns to say of my own personal knowledge that they are in existence.

Q. All you have done is to compile this list from the records and files of the American Medical Association?

A. All I have done is to take this list based on letters that we have received or advertisements that we have received, that have come into our office since January 1st, 1927.

Q. But you do have in that list Sanerina and Silph and you do not know that they have been out of business for a couple of years?

A. I do not know.

Q. And you do not know any more accurately about one concern than you do about any other one; you do not know anything about any of them of your own personal knowledge?

A. You mean as to the composition?

Q. No, of the concern.

A. No, I do not.

Mr. Connor: That is all.

Redirect Examination by Mr. Hornibrook:

Q. But you have received correspondence from these different institutions that you have named or else you have seen advertisements of them since the first of January, 1927, is that the fact?

A. I have either seen advertisements of these products that have appeared since that date or I have received letters from laymen who have asked about one of these listed preparations since that date.

Mr. Hornibrook: That is all.

Recross-examination by Mr. Connor:

Q. You say that you have seen an advertisement of Sangrina since January 1, 1927?

A. No; I was talking of this list here, aside from these products that I purchased in Chicago.

Q. The list includes Sangrina?

A. That is very true, but I should have explained that my purchases that are included in this list are not included in the sense that I have mentioned, that they were inquired about since that time although I am quite confident that I have received inquiries about Sangrina since January 1st, 1927. I can, if necessary, produce such correspondence. That is my belief. Of course, there are so many of those preparations that I cannot talk of them in detail.

Q. This inquiry you talk about is some inquiry from some physician?

A. Either a physician or layman.

Q. Asking about—

A. A layman might write in or a physician might write in and ask about these things.

Q. And your list is compiled from that kind of information?

A. From that kind of information, correct.

Q. Does the American Medical Association regard any of these products, or the products made by the names stated in this list as ethical products?

Mr. Hornibrook: Wait a minute, now. That is not proper cross-examination.

Mr. Connor: I think it is decidedly proper, Mr. Examiner.

Examiner Averill: Off the record.

(Discussion outside the record.)

Mr. Connor: It is my contention that there is no proof of unfair competition in Interstate Commerce. These products or the manufacturer of the products that are contained in this list that was read into the record to my understanding are all under the ban of the American Medical Association, everyone of them, and it is my understanding that this proceeding is not brought for the purpose of protecting them or any one of them from the competition of the respondent in this case, and I wish to show this to be a fact. That is the purpose of my question.

Arthur Crump Edward D. Hayes

Examiner Averill: What have you to say Mr. Hornibrook?

Mr. Hornibrook: I do not care to say anything. I just prefer to have the examiner rule.

Examiner Averill: Gentlemen, the objection to the question is sustained. The list of names that the witness has given is admitted simply for the purpose of showing that, as alleged in the complaint, there are other corporations, individuals or partnerships engaged in the manufacture and sale of remedies for obesity. The direct examination did not touch in any way upon the character of the remedies sold by the parties disclosed in the list read by the witness into the record and I do not think that we should enlarge the record by going into the question as to whether the remedies are efficient or whether they are not efficient or whether they are banned by an Association or whether they are approved by an Association.

Mr. Connor: There will be an exception to the ruling.

Examiner Averill: Yes, sir.

Mr. Connor: No further questions, doctor.

I move to strike out all of the testimony of Dr. Cramp in regard to the list that he read into the record and with regard to the purchases that he made, on the ground that he has no personal knowledge of what he testified to, everything is hearsay and then some.

Examiner Averill: The motion to strike is dedied.

(Witness excused.)

EDWARD D. HAYES, was recalled as a witness, having been heretofore duly sworn, and testified further as follows:

Direct Examination (Continued) by Mr. Hornibrook:

Q. Mr. Hayes, in the subpoena duces tecum issued to you you were requested to bring with you all of the advertisements of the old Marmola Company. Do you have them with you?

A. I have not got them all. I have all I could get.

Mr. Hornibrook: I will ask that they be marked for identification.

Examiner Averill: Gentlemen, the papers marked are Commission's Exhibit 13, for identification.

(The documents were thereupon marked Commission's Exhibit No. 13, for identification.)

By Mr. Hornibrook:

Q. What is Commission's Exhibit 13, marked for identification?

A. They are copies of advertisements of the Marmola Company.

Q. Do they bear the dates they were published?

A. No, they do not.

Q. Were they published by different magazines and newspapers throughout the United States or in the United States?

A. They were.

Q. And in different states in the Union?

A. Yes, sir.

Mr. Hornibrook: We offer those in evidence.

Mr. Gust: We object to them if the Examiner pleases on the ground that they are statements and advertisements of a corporate entity that is not a party to this record, and which is since out of business and they are wholly incompetent, irrelevant and immaterial to any of the questions raised by the complaint.

Examiner Averill: Do you care to be heard on that, Mr. Hornibrook?

Mr. Hornibrook: I just want the Examiner's ruling. We have had several discussions about that.

Examiner Averill: Yes, I just wanted to know if you had anything to say.

Gentlemen, the objection is sustained.

Mr. Hornibrook: Note an exception.

Examiner Averill: Yes, sir.

Mr. Hornibrook: I now offer to prove by Commission's Exhibit 13, marked for identification, that for more than five years last past the Marmola Company has advertised the remedy now manufactured and sold by the Raladam Company, the respondent herein, using the same character of advertising matter as is now used by the Raladam Company, and for the further purpose of proving that during that period of time the formula used by the old Marmola

Company in the marketing and sale of the product was the same as is now used by the Raladam Company.

Examiner Averill: Gentlemen, the offer of the documents as proof of things stated by counsel is rejected. Those matters have been proven by the sworn testimony of the manager of the Raladam Company, who was, according to his testimony, the manager of the Marmola Company.

Mr. Hornibrook: I note that the counsel have gathered up and taken away those documents that I just had marked for identification. I desire that they go along with the record, so that should I conclude to take this matter before the Commission I have something to predicate my motion on.

Examiner Averill: Certainly. I said mark the papers offered and rejected, as we usually do, and then if you wish to take an appeal you can notify the gentlemen of the appeal and they can be heard upon the appeal from the ruling of the Examiner. All right, gentlemen, go ahead.

Mr. Hornibrook: Now, in view of the ruling of the Examiner with reference to the hearing before the Postal Authorities held against the old Marmola Company I wish to make the following offer:

That if permitted to do so I will prove by the witness now on the stand that the old Marmola Company was cited to appear before the Postal Authorities at Washington, D. C. in December, 1926, to show cause why a fraud order should not issue against them; that hearings were had upon that citation on January 27 and 28th, 1927; that in the meantime and on January 15th, 1927, the Raladam Company was organized and took over all of the good will and business of the old Marmola Company; that during the said hearing before the Postal Authorities on January 28, 1927, the witness who was then the President of the old Marmola Company made the following statement to the Postal Authorities: That if a continuance of said hearing should be granted to April 1, 1927, the business being operated in the United States by the Marmola Company would be absolutely discontinued and abandoned and would not be resumed, and that the Postmaster at Detroit, Michigan, would be directed to treat as refused all mail received at his office addressed to the Marmola Company; that on the 31st day of March, A. D. 1927,

the witness Hayes, then president of the Marmola Company, voluntarily filed with the Postal Authorities, in the matter of said hearing, an affidavit containing the following language:

"Deponent further says that in conformity with the proceedings had before Horace J. Donnelly, Solicitor for the Post Office Department at his office in Washington, January 25th to January 28th, 1927, and the stipulation granting a continuance in said proceedings, said Marmola Company has absolutely discontinued the business heretofore operated by it in the United States and will not resume said business under said name or any other name, and that the Postmaster at Detroit is directed to henceforth, from the date of this affidavit, namely March 31, 1927, treat as refused all mail thereafter received at this office addressed to said Marmola Company."

I offer to prove those things by this witness if I am permitted to do so.

Examiner Averill: Gentlemen, it is utterly impossible for the examiner to rule on a blanket offer of proof. Some of the things recited in the blanket offer have been, without any objection, already admitted in evidence. Others have not been directly tendered in evidence, and it is utterly impossible to make a ruling on a blanket offer.

Mr. Hornibrook: If the Examiner feels that he cannot rule upon the offer as made I will make it in another way.

I offer to prove by this witness that the continuance was granted upon the date heretofore mentioned in my previous statement by the Postal Authorities upon the statement of the witness Hayes as above set forth in the previous offer, and that later, and on March 31, 1927, the witness filed with the Postal Authorities an affidavit containing the language set out in the previous offer, and that as a result of which affidavit the proceedings under the citation heretofore mentioned in the previous offer were dismissed.

Does that make it so that the Examiner may rule on it?

Examiner Averill: Yes. Is there any objection to this?

Mr. Gust: Yes, sir, we object to the Government adducing the proof that counsel states in his offer, for the reason that it is wholly irrelevant and in-

competent to any of the issues recited in this proceedings. He has not stated for what purpose it is offered but I assume our previous discussions perhaps on other similar points has sufficiently brought that out, that even though those matters were proved they would be incompetent and irrelevant to any issue that this respondent is called to meet in this proceedings.

Examiner Averill: Gentlemen, the view taken by the Examiner is that any proceeding which may have been instituted or conducted by the Post Office Department against the Marmola Company is irrelevant and incompetent to any of the issues raised by the present complaint and for that reason I should feel compelled to reject proof of that nature.

Mr. Hornibrook: May I have an exception?

Examiner Averill: Yes, sir.

Mr. Hornibrook: That is all, Mr. Hayes.

(Witness excused.)

Examiner Averill: We will adjourn until ten o'clock tomorrow morning.

Thereupon at 12:30 p. m. July 26, 1928, an adjournment was taken until ten o'clock July 27th, 1928.

Docket No. 1496,
Chicago, July 27, 1928.

Met pursuant to adjournment, 10:00 o'clock a. m.

Before:

Edward M. Averill, Examiner.

Appearances:

Edward J. Hornibrook (Washington, D. C.) for the Federal Trade Commission.

Rockwell T. Gust, 2214 First National Bank Building, Detroit, Michigan; R. M. Connor, 560 Equity Building, Detroit, Michigan; Robert E. Cantwell, Jr., 1105 Hartford Building, Chicago, Illinois, attorneys for the respondent.

Mr. Hornibrook: We are ready to proceed.

Examiner Averill: All right. Call your witness.

Mr. Hornibrook: We will call Dr. Strouse.

SOLOMON STROUSE, was called as a witness, having been first duly sworn, testified as follows:

Solomon Strouse

Direct Examination by Mr. Hornibrook:

Mr. Hornibrook: Shall I proceed?

Examiner Averill: Yes.

Mr. Hornibrook: Will you please lay in front of the doctor Commission's Exhibit 4?

Examiner Averill: Yes, sir.

By Mr. Hornibrook:

Q. What is your occupation, doctor?
A. Physician.
Q. And what is your office address?
A. 104 South Michigan Avenue.
Q. How long have you been a physician?
A. Since 1906. 22 years.
Q. Where did you graduate?
A. John Hopkins University.
Q. In what year?
A. 1906.
Q. Have you practiced medicine continuously since then?
A. All except three years from 1909 to 1912 while I was in the laboratory of the Michael Reese Hospital as a pathologist from 1909 to 1912.
Q. Where is that laboratory?
A. The Michael Reese Hospital, Chicago.
Q. And what were your duties there?
A. I was associate pathologist. I had charge of the clinical laboratory.
Q. Where have you practiced medicine?
A. Practiced in Baltimore, Maryland, from 1907 to 1909 and in Chicago from 1912 to date.
Q. What degrees do you have?
A. A. B. and M. D.
Q. Have you taken any post graduate work?
A. You mean studied outside, at other places?
Q. Yes.
A. No.
Q. Is your practice extensive?
A. That is a rather hard question to ask a doctor to answer. I work every day all day.
Q. Have you been connected with any hospitals or schools during their period?
A. Practically continually.
Q. What schools or hospitals?

A. I was an interne at John Hopkins from 1906 to 1907. I was working in their laboratories from 1907 to 1909. Then I was in the laboratories here in Chicago from 1909 to 1912. I have been on the staff of the Michael Reese Hospital.

Q. In what capacity?

A. Associate and now attending physician.

Q. Do you specialize in any particular branch of medicine?

A. Yes, sir, internal medicine.

Q. Have you used thyroid, desiccated thyroid, extensively in your practice?

A. I have used it, yes sir.

Q. Have you made a special study of thyroid and its affects?

A. Yes, sir.

Q. You are asked to examine Exhibit No. 4, being the formula of Marmola, the remedy in question in this case, particularly noting the ingredients that go into the Marmola tablets and the amounts thereof. Have you examined it?

A. Yes, I have examined it.

Q. Do you note the one-half grain of desiccated thyroid?

A. Yes.

Q. Is thyroid regarded by the profession as a dangerous drug?

A. I think thyroid is regarded by the profession as a very powerful drug, whose use must be steadily controlled.

Q. You note there in that formula, do you not, two physics?

A. Yes, sir.

Q. Are you familiar with the physic known as Dilaxin?

A. As what?

Q. Dilaxin.

A. No.

Q. Assuming doctor, that those tablets, the Marmola tablets, were taken four times a day for a period of from sixty to ninety days together with another laxative would that be apt to create in a patient what is known as the laxative habit?

A. I should think so. This makes a grain of cascara and a grain of phenolphthalein a day, if four tablets are taken a day.

Solomon Strouse

Q. Do physicians prescribe this thyroid remedy with much caution?

A. Cautious physicians, do, certainly.

Mr. Cantwell: What was that answer?

A. Cautious physicians do.

By Mr. Hornibrook:

Q. Assuming that this tablet, Marmola tablets, was given four times a day for a period of from sixty to ninety days, what would you say as to that being proper or improper?

A. I never did it in my practice.

Q. What would you say as to its being dangerous?

A. I should say the possibilities of danger are great.

Q. What would be apt to result?

A. It would be apt to produce toxic thyroid, fast pulse, nervousness, symptoms of toxic thyroid.

Q. Would it be apt to affect the heart?

A. Yes, it would, probably secondarily, but certainly the heart. It shows the effect very quickly.

Q. Would that be true in a normal person or what might be termed an average person?

A. I think So. I do not think it makes very much difference between the type of person. It certainly has not in my own experience.

Q. Do you know of any cases where the overdosage of thyroid has resulted in poisoning?

A. Yes, sir, if by poisoning you mean the medical term of toxic symptoms.

Q. Yes.

A. I want to be clear on that.

Q. Yes.

A. I would say yes without any hesitation.

Q. Now, when you are giving thyroid, doctor, what examination do you give your patient before you administer it?

A. I give a complete physical examination and usually a basal methabolism.

Q. Then after you have prescribed the thyroid, what do you do with the patient?

A. I usually start with a very small dose, either a quarter of a grain three times a day, sometimes a half a grain three times a day, and report back every week.

Q. Report back every week?

A. Yes, sir.

Q. For observation?

A. Yes.

Q. Supposing you find a condition of nervousness, what do you then do?

A. Stop it.

Q. Stop it?

A. Yes.

Q. I will ask you to state whether thyroid can at the same time build up muscle and yet destroy fat?

A. I do not see how that is possible.

Q. Different anatomies can take more thyroid than others, I assume.

A. Yes, sir, there is absolutely, so far as I know, no way of judging a dose of thyroid for an individual case, and by that I mean even using all our contraptions of modern medicine, including metabolic rate and everything.

Q. What would you say of two grains of thyroid given each day for a period of sixty to ninety days, to the average person?

A. I say what I said before, there is the potency of considerable damage being done to the individual.

Q. And in some instances it might be very serious, might it?

A. Yes. I have cases of toxic poisoning from smaller doses than that.

Q. And I will ask you whether in your practice you have ever come in contact with a patient who had used Marmola?

A. No, sir, I have not, not that I know of, because none have admitted it.

Q. Has scientific research so far progressed that any person or persons may be able to prescribe thyroid for use to be sold to the public—

A. I do not get that question at all.

Mr. Hornibrook: Just read that over to me as far as I went, Mr. Reporter.

(Question read as above recorded.)

By Mr. Hornibrook:

Q. (Continuing)—in a given quantity and for a fixed period of time, without, first, examination by the patient and observation during the period that such thyroid is taken?

A. No, sir, it has not.

Q. Will thyroid act with uniformity or even a rea-

sonable degree of uniformity upon the body of all users thereof?

A. It will not, I had to answer a question on that sometime ago and I spoke—is this to the point?

Q. Yes.

A. I spoke to a thyroid manufacturer, a very scientific man and asked him if any—

Mr. Gust: If the Court please, I, of course, object to the witness' conversation with this third person.

Examiner Averill: Doctor, you can tell the results of any research of yours, but do not repeat what someone else may have told you.

The Witness: All right. Then will you ask the question again, please?

Examiner Averill: I think he answered the question, but the witness was going beyond the scope of the question.

Mr. Hornibrook: He answered the question, yes.

Examiner Averill: But he was telling us something else, giving us an example.

The Witness: I can answer it further.

Mr. Gust: I think you have answered it, Doctor.

Mr. Hornibrook: I think you have answered it.

Examiner Averill: Yes.

By Mr. Hornibrook:

Q. But have you made any special research, doctor, to ascertain that which enables you to arrive at the conclusion which you have just given?

A. You mean as to a standard dose?

Q. Yes.

A. I have tried research in this respect, that I have taken people of different weights, different builds, different basal metabolic rates, and I am unable to come to any conclusion as to dose of thyroid to start them on.

Q. And much less a standard dose?

A. Yes, sir, I cannot get a standard dose.

Q. Has scientific research so far progressed that thyroid may be administered in a given quantity so as to be generally effective for the reduction of excess flesh of the users thereof, without imperiling the health of a substantial portion of such users, and without danger of bringing to such substantial portion injuries resulting to physicial health requiring the services of skillful phy-

sicians successfully to neutralize or counteract such serious results.

A. That is a pretty long question. May I have it again?

Mr. Hornibrook: Read it, please.

The Witness: It has got a lot of things in it.

Mr. Hornibrook: Yes, read it, Mr. Reporter.

(Question read as above recorded.)

A. May I ask a question about the word "substantial"?

By Mr. Hornibrook:

Q. Yes.

A. What that means, what "substantial" means. I want to be absolutely accurate in my answer. The word "substantial" might be open to question.

Q. Strike the word "substantial" and leave it "a portion of such users." Would that be better?

A. Then I would not hesitate to answer it, Mr. Hornibrook.

Q. Yes.

A. I would say it had not.

Q. May Marmola as made, following the formula there before you on Commission's Exhibit No. 4, be used for a period of from sixty to ninety days, a two grain dosage a day, one tablet before each meal and one before retiring—be used safely by individuals without previous consultation with a competent medical adviser?

A. May be safely?

Q. Yes.

A. No, it may not.

Q. Doctor, is not the use of thyroid for the reduction of excese flesh under the directions of a competent physician fraught with possible injury?

A. It is fraught with possible injury, yes it is.

Q. Examining Commission's Exhibit No. 4 and assuming that the directions are to take that for a period of sixty to ninety days, two grains a day, or until satisfactory results are brought about, state whether or not that is a scientifically accurate method of treatment?

A. It is not.

Q. Assuming, doctor, that a person, an obese person, takes Marmola in accordance with the directions indicated in the previous question and for the period indicated in the previous question and at the same time follows these suggestions: "Avoid starches and sweets in excess, cut down fatty foods. Instead of them eat

poultry, game, eggs, clear soups, fish and sea foods. All kinds of fruits and fresh vegetables are good. Eat all you want of them, but be sparing of foods with high caloric contents, like sugar, cereals and fat. Chew all foods well, even your soups. A good rule is to chew all foods until they slip down without swallowing. At every meal eat a little less than you think you need." Assuming that the patient takes thyroid in the amounts indicated in the previous question and for the period of time as indicated and follows these directions or suggestions as to diet, is the taking of this Marmola remedy for that period, in the quantities indicated, following these directions just read, dangerous?

A. I answered that question before. I said it was.

Q. But I did not indicate diet before, doctor?

A. Diet does not affect the danger of it at all.

Q. Then you would say as a general proposition it is impossible to prescribe a diet which would neutralize the danger of taking this Marmola tablet?

A. Absolutely not. May I say that that diet is just a little caloric diet.

Q. Yes.

A. That is all that is.

Q. In the treatment of obesity, doctor, does not one have to prescribe a different diet for each person?

A. No, not necessarily.

Q. I would put it differently then. All persons should not have the same diet during the treatment of obesity, should they?

A. To answer that I will have to make this statement; that the diet in the treatment of obesity is purely a question of calories.

Q. Yes.

A. It is a reduction of calories and as long as it does not unbalance the proportions in their diet too much, it does not make much difference how they take their calories, if they reduce the calories in toto.

Q. Does not the very diet itself require constant observation on the part of the physician to see that the patient is progressing satisfactorily so far as his general health is concerned, under that diet?

A. In general, yes, but not very specifically. I mean it is not very important—of course, they can unbalance the diet and some patients do, but generally they do not. Instructions are given to the patient and he follows them through.

Q. Do you use thyroid as a treatment for obesity?

A. I use thyroid quite frequently.

Q. As a treatment for obesity?

A. Yes.

Q. On what occasions?

A. I use it when, after reduction of a diet alone, we reach a stage where we want to reduce further and the diet reduction is slow or stopped; then I slowly give them thyroid. Not in all cases, but I have done it in a good many.

Q. But not without first making your examination and diagnosis which you have described heretofore?

A. Yes, sir.

Q. And not without the observation, continued observation, as you have indicated?

A. Yes.

Q. Now, in addition to the diet which I have described here in the hypothetical question, assuming that the patient took moderate exercise along with that diet and with this Marmola for the period indicated and in the quantities indicated, would that lessen the dangers of Marmola?

A. Not at all.

Q. I do not know whether I have asked you this question before or not, but I will ask it again to be sure of it. Would the average person be subject to the dangers about which you speak in the taking of Marmola for the period of sixty to ninety days in the quantities indicated?

A. Assuming there is an average person, I should say the danger was present for the average person.

Q. And also for the normal person, putting it a different way?

A. Yes, sir.

Q. Would any diet obviate the danger attendant with the taking of Marmola for the period indicated and in the quantities indicated?

A. I have tried various diets when I have used thyroid and it does not seem to make any difference at all.

Q. Doctor, what causes obesity? In other words, is it always caused from defective thyroid glands, and if not, just give us a statement about it.

A. May I state something about my own experimental work?

Q. Yes.

A. I have been working on obesity for the last eight years, making a very careful study. The only objective evidence that we have a thyroid deficiency, the only actual medical evidence that we have, is in the basal meta-

bolism. The number of cases of real obesity that have basal metabolic rates that would indicate thyroid deficiency are small. I think it is the rarest type of obesity that we know, true thyroid obesity.

Q. What are the other types and causes?

A. Of course, the common type is over eating and under exercise. That is the lazy obesity. That is probably the commonest of all. It probably runs into ninety per cent. Then there is a small group in which there is apparently some disturbance of the ductless glands, the various ductless glands, pituitary and the sex glands. That is probably as far as we can go. Some of them are typed so you can pick them out as belonging to a certain group, but most of them are not. Most of them are rather vague. In the effort I have made to separate them I have gotten nowhere at all.

Q. In questions of obesity, the causes of which are attributable to those last ones, which you have enumerated and described, would the administration of thyroid be the proper remedy for them?

A. The administration of thyroid has never become a remedy for the reduction of any obesity until the diet is first tried alone. You cannot, as far as I can determine, reduce any patient by thyroid alone, unless they are dieting with it. Most patients, if they diet, will reduce, if they diet sufficiently.

Q. And that diet should be prescribed for each patient, is that the fact?

A. Practically, yes.

Q. You have examined Commission's Exhibit 4, state whether or no the dangerous ingredient there is the thyroid, or are there other dangerous ingredients?

A. Whether the dangerous ingredient is thyroid?

Q. Yes.

A. Oh, I think so.

Q. What would you say, doctor, of a person reducing three or four pounds per week, for a period of sixty to ninety days; is that safe?

A. I do not think the rate of reduction is very important. It simply depends on the individual.

Q. Would it be safe for all persons to reduce three or four pounds a week?

A. No, I do not think that would be safe.

Q. Do you have in your practice or have you had in your practice patients who could not take much thyroid without symptoms of toxic poisoning?

A. Oh, yes.

Q. Just give us the history of some of them, if you will, doctor, and the amounts that you have found that they cannot safely take without producing that condition?

A. Well, the cook in my own house has been taking thyroid, a grain a day, and if she only takes it six days, four, five or six days, she immediately gets palpitation She fainted the other day. I do not know whether that was due to the thyroid. She gets a very fast pulse and simply gets knocked out. And that is one grain a day.

Q. One grain a day?

A. Yes.

Q. And those results come about in how long a period of time, do you say?

A. Well, within a week.

Q. Within a week?

A. Yes, sir.

Q. Are there others?

A. Yes. I recall one very stout woman who was taking a grain and a half a day, who wrote me if she should continue it because of the fact that she had vertigo, palpitation, was exceedingly nervous and getting headaches. I have one case in which, following the use of a grain or a grain and a half a day, I cannot tell you for exactly how long—which was given by a reputable physician for a skin disease he thought was due to insufficient thyroid, that woman developed a goitre, for which she had to be operated on. I have one case on record of that.

Q. Have you frequently encountered in your practice, doctor, patients who could not take thyroid in amounts of, say, over a grain a day?

A. It has been very frequent for me to find persons who have taken over a grain a day who developed fast pulse and nervousness, which I have always taken as a warning of toxic symptoms, and have therefore stopped it.

Q. Did you say over a grain or a grain and a half?

A. A grain or a grain and a half. I sometimes only give them three-fourths of a grain to start with. Never more than a grain and a half a day.

Q. Then more after careful examination?

A. Yes.

Mr. Hornibrook: You may take the witness. One more question.

Solomon Strouse

By Mr. Hornibrook:

Q. I will ask you, doctor, if you know what the practice is generally among reputable physicians, as to the amount of thyroid, that is, as to the quantities that they give?

Mr. Gust: If the Court please I do not believe that—

Mr. Hornibrook: I am asking him if he knows, first.

Mr. Gust: I see.

A. I do not know.

By Mr. Hornibrook:

Q. You do not know?

A. No, I do not know.

Mr. Hornibrook: That is all.

Cross-examination by Mr. Gust:

Q. Doctor, how long have you been using thyroid in your own practice?

A. I suppose ever since I started, off and on.

Q. I was wondering about how long that was. Is it a new drug?

A. Thyroid a new drug?

Q. Yes.

A. Thyroid was used before I was in the medical school by Osler, I know, in frequent treatments in one of the historical episodes of medicine, but I could not tell you when it was introduced on the market as dried extract.

Q. But it has been on the market ever since you have been practicing?

A. As far as I recall. I am not very good on dates.

Q. You say that some of your patients can take more thyroid than others, without producing any toxic results?

A. Yes, sir.

Q. I suppose it has been your experience, doctor, that that is true of most other drugs?

A. It is true in general.

Q. There are some people who have a so called idiosyncrasy for quinine, is not that right?

A. Yes.

Q. And a dose in them will produce results which another person would not experience at all, under the same conditions?

A. Occasionally.

Q. And the quinine I mention is not the only such drug; it is practically true of all drugs, as I understand it.

A. I would not say that. Not in the same sense in which we have been talking here. You know, when you give an average person a quarter of a grain or a sixth of a grain of morphine, you know pretty well what to expect and you know pretty well what the result will be, and you know you do occasionally strike people whom morphine makes excited. That is only the rare instance and that is quite different from the point I am making in the use of thyroid and that is that we have no basis from which to judge, even in the initial dose. Do I make my point clear?

Q. You make it clear to this extent, doctor, that you have determined in your mind to start with three-fourths of a grain to a grain and a half.

A. Yes.

Q. Those are the limits within which you start, is that true?

A. Yes.

Mr. Hornibrook: Let me have that last question and his answer.

(Record read as above recorded.)

By Mr. Gust:

Q. You mentioned morphine, doctor—

Mr. Hornibrook: Right there; you mean daily doses in putting that question, did you, Mr. Gust?

Mr. Gust: Yes, I meant daily doses. I assumed the doctor did.

The Witness: Yes, the total daily dose.

Mr. Gust: Yes.

The Witness: As I said before.

By Mr. Gust:

Q. The suggestion is made to me that you mentioned morphine here. There is no morphine in this drug nor any derivitive of morphia?

A. Oh, no.

Q. You just used that by way of illustration?

A By way of illustration.

Examiner Averill: Just as you used quinine, I judge.

Mr. Gust: Yes, I understood him so, but I did not want any misunderstanding about it.

Examiner Averill: Yes, I understand.

By Mr. Gust:

Q. You were directed to certain suggestions of diet by Mr. Hornibrook, counsel for the Government and you said, I believe, that that was a low calorie diet, was that right?

A. Which was the low calorie diet?

Q. The diet which he read to you?

A. Yes. In fact, that is an effort at low caloric. In fact it says so in the last sentence.

Q. It is in fact a low calorie diet, is it not?

A. Yes, sir.

Q. And that is the general class of diet that an obese person is put on in order to reduce, is that it?

A. Yes, sir.

Q. You use this drug, as I understand you, doctor, largely in people who suffer from the rigors of a diet low enough to reduce them, where they want to be reduced, is that right?

A. Will you say that over again?

Q. I say you use thyroid largely in your own practice in obesity in cases where you find an obese person who suffers from the rigors of an enforced diet sufficiently low to reduce them to the place they want to be?

A. That is not exactly what I said. I said when they do not reduce on a certain diet I sometimes try the effect of thyroid in accelerating the reduction. That is a little bit different from the way you put it.

Q. You mean to exclude the assumption of mine that at all times people were suffering from the rigorusness of your diet, is that it?

A. Put it that way if you want.

Q. You administer thyroid to increase the rate of metabolism?

A. Yes, sir.

Q. You do that in those patients who have not reduced sufficiently on diet?

A. Yes, sir.

Q. That is, the effect of thyroid when introduced in-

to the system is to increase the rate of methabolism, is it not?

A. Yes, sir.

Q. That is the effect on all perosns?

A. That is the effect on all persons, did you say?

Q. To increase their rate of metabolism?

A. Oh, yes.

Q. Are there other ways in which the rate of metabolism may be increased, besides taking thyroid?

A. Exercise.

Q. Anything else?

A. Illness, fevers. But you do not want those.

Q. I mean—

A. In the ordinary run of life?

Q. Yes.

A. I do not know of anything but exercise. Hot baths may increase it a bit. It does increase it a bit, as a matter of fact.

Q. Do you have any other drugs which you prescribe for that purpose?

A. No, I have never seen any other drug work. I have tried some of the other ductless glands, but I have never been able to prove it.

Q. As far as you know this is the only drug which will increase the rate of metabolism in all people?

A. Yes.

Q. You said something about the continuous use of cascara in the quantity present in that prescription as being apt to cause a cathartic habit?

A. I said that grain of cascara and a grain of phnolphthalein a day, which is what four tablets of this would contain, might produce the cathartic habit.

Q. That would be true of whatever way the person took the cathartic, would it not? I mean to say it does not have any significance that it is combined in the particular way you find it in that prescription?

A. No, sir.

Q. If he took any other cathartic continuously he might get the cathartic habit, is that true?

A. Yes, sir.

Q. Both of those ingredients are well recognized cathartics, are they not?

A. Yes.

Q. Cascara is one of the cathartics that is recognized as being perhaps I should say as little irritating as any cathartic?

A. I do not know that I would say that. I think cascara is as irritating as any cathartic.

Solomon Strouse

Q. You think cascara is as irritating as any cathartic which is in general use?

A. I might accept the salines, epsom salts and that sort, but of any of the so-called vegetable cathartics I think cascara is as irritating as any of them. I think they run about the same.

By Examiner Averill:

Q. You think it is as irritating as castor oil?

A. Sir?

Q. Do you think it is as irritating as castor oil?

A. Castor oil is supposed to be healing after it has its initial effects. That is the reason it is used in dysentery, because it is supposed to have a healing effect after the cathartic.

By Mr. Gust:

Q. An obese person who commences to reduce and gets a little more active, takes a little more exercise, tends to build up some muscle, is not that true, doctor?

A. Not until he has used up his fat.

Q. When an obese person commences to reduce is fat the first thing that goes?

A. The small store of glycogen is the first thing that goes. There is a very small store of that and that is usually gone first few days, and then the fat.

Q. Then the fat is the next thing?

A. Yes, sir.

Q. And it commences to go after two or three days in the common case?

A. It may start at the beginning but the chances are that almost everybody will lose a lot a first, and that is usually the glycogen and, within a few days, the fat.

Q. And the fat continues to be thing that goes as the patient continues to reduce?

A. Fat will go probably before anything else is attacked.

Q. And if the patient continues to exercise he will tend to build up some muscle, will he not, doctor?

A. Well, that question could be answered in various ways. Of course, the first thing that the exercise does is to increase the rate of the fire, does it not?

Q. Yes.

A. So that will help at first to burn up the fat.

Q. Yes.

A. Then later on after the fat is burned up, if he

does not continue the low diet of reducing too much he might put on muscle, but if you give exercise and keep up with the other reducing methods like thyroid, the muscle itself would be attacked and used up by the fire.

Q. That is, if he exercised sufficiently?

A. It is all a question of quantative relation, intake and output, if anything.

Q. If he does a normal amount of exercise, nothing too strenuous—perhaps he walks a good deal, it would tend to build up muscle, would it not?

A. Again, it is a question entirely of a balance between intake and the use of energy.

Q. Yes.

A. He cannot build up muscle at any time through exercise if the intake of food is low or if he is being given thyroid to increase the metabolism: It is a fire burning proposition, and it is purely that equation that enters into it.

Q. What I am trying to get at is this, doctor: Of course, if he does not eat enough food to get any muscle from, and burns it all up, he won't build any muscle?

A. Exactly.

Q. But if he has rid himself of this excess fat and he takes a moderate amount of exercise, eats enough so that his intake exceeds the burning, he will tend to build up muscle?

A. Oh, yes.

Mr. Gust: That is all.

By Examiner Averill:

Q. Doctor, if you had a patient whom you were treating for obesity and you were administering thyroid as a part of your treatment—of course, under observation, as you stated, including all those conditions—what I would like to know is whether the toxic effect of the thyroid, if any, are observable during the process of the consumption of the excess fat, or would such toxic effects only appear after the fat had been disposed of?

A. They might appear in the first week, Judge. They might appear almost immediately before there is any reduction.

Q. I was just wondering whether the presence of the fat would retard appearance of the toxic effects, if there were any toxic effects.

A. One might think so in theory—

Q. Or whether it would not occur until after the fat had been disposed of?

A. Yes, I see your point, but I have noticed no difference at all.

Q. When I say disposed of, I do not mean utterly disposed of, but I mean until an appreciable disposition had been made of it.

A. If I may reword your question just to make it clear to myself, you want to find out if thyroid works differently before it has even started any fat burning, any fat consumption, than it does after the fat has already begun to get used up. In other words, is the fat a protective mechanism against the supposed toxic effects of thyorid?

Q. Yes; or certainly a protection against such effects, if such effects exist, being observable. That was my question.

A. I would say it makes no difference whatsoever.

Q. It makes no difference whatsoever?

A. No, sir.

Mr. Hornibrook: In my qualifying questions I overlooked one, and perhaps many things that I would like to ask the doctor along that line.

Mr. Gust: All right.

Redirect Examination by Mr. Hornibrook:

Q. Doctor, have you ever done any research work for magazines as to the disease commonly known or affliction commonly known as obesity?

A. Plenty of it.

Q. Just give us some of the work that you have done?

A. I have published a series of articles in the Archives of Internal Medicine, in an effort to study the why of obesity, a lot of careful metabolic chemical studies. I think I published four or five articles on that. Then I read a paper before the Association of American Physicians in 1926, I think. I have a copy of that. May I look at that just to see the date?

Q. Yes.

A. 1927, not 1926. In which I attempted to study and evaluate the various factors that were used in the treatment of obesity. I also published several popular articles, at the request of the American Medical Association, for different magazines. I gave a summary before the New York Academy of Medicine in 1928 on the whole

question of obesity, a few of our own and others' research. Is that enough?

Q. Were you ever requested to do any special work for the Delinator Magazine?

A. Oh, yes, I have forgotten that. That was a couple of years ago, when the Delineator magazine, the editor of the Delineator thought that she was receiving—

Mr. Gust: Just a minute. I object to what the editor of the Delineator thought.

Examiner Averill: That is right. Just keep that in mind, doctor.

A. I went to New York at the request of the editor of the Delineator with a group of supposed experts on the quantitative rate question, to attend a conference for the purpose of studying and formulating a program.

By Mr. Hornibrook:

Q. Doctor, in prescribing a diet for an obese person you would study the patient and prescribe a balanced diet, wouldn't you?

A. There are several ways that I personally use, if you want me to give you that.

Q. Yes.

A. One way which is the simplest and most logical is to find out what the patient is eating, have them keep a diary of their food for a week or two before starting in reduction. Nine times out of ten a glance at that by anyone who knows food values, you can take a blue pencil and either say "Cut this" or "Take a half of that" and "Cut the 3,000 or 4,000 calorie diet down at once," without in anyway destroying or without in any way ending with a badly balanced diet.

Another way I do with some patients, I have certain diet lists that I use and I work them out for individual patients. I try not to get away from two things. One is long established food habits that are good, secondly, balance ratios of food.

Q. You would suggest how much of each article of food should be taken and not make a general suggestion, the danger be that under a general suggestion of diet the patient might take too much of one thing and not enough of another. Is that the fact?

A. There is one danger in some of the older dietary methods, about which a certain book was written a few years ago, and that is that they cut out entirely the

starches and make it up with the proteins, so that the patient gets too high a diet in proteins, which apparently is not as easy to handle and apparently has a certain, at least slightly damaging effect and for that reason I usually give them their diet in portions of this and portions of that.

Q. Yes.

A. Not weighed usually.

Q. Is not the suggestion that obese patients cut down on starches and fat likely to lead to an unbalanced diet, unless such suggestions are detailed and the patient warned against it?

A. If they only cut down and do not cut out there is not much danger. But if they cut out and then make it up on proteins, meat, lamb, chicken, fish, there is a certain risk there.

Q. Yes.

A. It is not very great but it does occur. It is not as safe a way as a general cutting down.

Mr. Hornibrook: That is all.

Recross-examination by Mr. Gust:

Q. The best thing to do in dieting then, as I understand it, doctor, is for a man to cut down the amount that he is already eating?

A. Unless there is a definite overeating. You take the society women who comes in and gives you a list of three meals a day and forgets to put down at three or four o'clock in the afternoon she went to a tea party, and had a cocktail and a highball and a few batches of chicken salad with mayonnaise.

Q. But generally speaking the proper method is to cut down on the amount and to avoid those fat producing foods to some extent?

A. Horizontal reduction on the top as contrasted to a vertical reduction of one item is always a safer way to reduce. Anybody could reduce by himself if they wanted to and had the willpower to cut off horizontally.

Mr. Gust: That is all.
Mr. Hornibrook: That is all.
(Witness excused.)

Mr. Hornibrook: I will recall Mr. Hayes.

Edward D. Hayes

EDWARD D. HAYES was recalled as a witness, having been heretofore duly sworn, and testified further as follows.

Direct Examination (Continued) by Mr. Hornibrook:

Q. Mr. Hayes, is Marmola and the form of treatment prescribed for it recognized by authorities the world over?

A. I believe it is.

Q. By what authorities?

A. Medical authorities.

Q. Do doctors prescribe it?

A. They do.

Q. In what numbers?

A. I do not know.

Q. Do you mean to say that the medical profession recognizes Marmola as a cure for obesity and a proper treatment?

A. I say they prescribe it for obesity.

Q. And do you say that physicians have watched its affect for many years and in myriads of cases?

A. That term is used just in connection with these ingredients of desiccated thyroid.

Q. You do not mean then by that, that Marmola has been used and recognized by authorities the world over, but the thyroid in Marmola is that what you mean?

A. That is, yes, sir.

Q. And would you say about physicians having watched its affect for many years and in myrads of cases, that they have watched the effect of thyroid and not the effect of Marmola?

A. Yes, sir.

Q. Has one specialist in obesity, and whom you have largely consulted, records of four thousand cases covering nearly every type and condition where Marmola has been used as an obesity cure or treatment?

A. I think that applies to that.

Q. That applies to the thyroid in Marmola?

A. Yes.

Q. Not to the quantities in Marmola but to thyroid generally, is that the fact?

A. Yes.

Mr. Hornibrook: That is all.

This is all we have to offer at this Chicago hearing. Wait just one moment. I want to call Dr. Cramp.

Examiner Averill: You have finished with Mr. Hayes?

Mr. Hornibrook: Yes, for the time being.

Mr. Gust: At this hearing?

Mr. Hornibrook: Yes.

(Witness excused.)

ARTHUR J. CRAMP, was recalled as a witness, having been heretofore duly sworn, testified further as follows:

Direct Examination by Mr. Hornibrook:

Q. Dr. Cramp, you were on the stand yesterday?

A. Yes.

Q. And since yesterday have you made any further investigation as to obesity cures or treatments which are on the market?

A. I have.

Q. State what was the result of that investigation. Just go ahead and tell the story.

A. I made an effort to be in a position to satisfy these gentlemen that I know of my own personal knowledge that there were some obesity remedies on the market. So I took the opportunity yesterday of getting in touch with the O. B. C. T. Laboratories, 4016 Lincoln Avenue, Chicago, which puts out an obesity remedy. They are in business and very anxious to sell me their remedy.

Venus Reducing Cream, put out by the Landin Company of 4206 Montrose Avenue, Chicago, an advertisement of which I have before me. They too are in business.

Mr. Hornibrook: We ask that that be marked as Commission's Exhibit, whatever the number is.

The Witness: This, of course, has not been submitted before.

Mr. Hornibrook: Mr. Examiner, we ask that that be marked.

The Witness: The Health Laboratories—

Examiner Averill: Just a moment. Let us get this thing marked.

The Witness: Pardon me.

Examiner Averill: The paper is marked Commission's Exhibit 14, for identification.

(The document was thereupon marked Commission's Exhibit 14, for identification.)

Arthur J. Cramp

By Mr. Hornibrook:

Q. When was Commission's Exhibit 14 marked for identification published and in what paper was it found.

A. I do not know the paper. It was sent in to me by one of the Better Business Bureaus. It had on the advertisement the date of its appearance. Is that April 1st, or January 4th?

Mr. Hornibrook: We will withdraw that as not properly identified, Mr. Examiner.

Examiner Averill: All right.

The Witness: I got in touch also with the Health Laboratories in Chicago, in the Stevens Building, which has Nature's Way Reducing Cream. They too are in business and anxious to sell their products.

In addition I found in the files a letter from the F. J. Kellogg of Battle Creek, Michigan, dated April 27, 1928, which I submit as an exhibit to show that it was in existence at that time.

Mr. Hornibrook: We ask that be marked.

Mr. Connor: Is this letter offered in evidence?

Examiner Averill: No, sir, it has not been.

Mr. Hornibrook: I just ask that it be marked.

Examiner Averill: He just wants it marked for identification.

Mr. Connor: I see.

Examiner Averill: I do not see the object of marking this for identification. It just makes a lot of numbers for nothing. Commission's Exhibit 15, for identification.

(The document was thereupon marked Commission's Exhibit No. 15, for identification.)

By Mr. Hornibrook:

Q. What is Commission's Exhibit 15, for identification?

A. It is a letter from F. J. Kellogg Company of Battle Creek, Michigan, which sells an alleged "rational treatment for obesity." It is dated April 27, 1928.

Mr. Hornibrook: We offer that.

Mr. Connor: I object to it as irrelevant, immaterial and incompetent.

Examiner Averill: Off the record.

(Discussion outside the record.)

Arthur J. Cramp

By Mr. Hornibrook:

Q. Doctor, give us a list of those that you know of your own knowledge and their addresses that are now in business selling obesity cures or treatments?

Examiner Averill: Well, now wait. Let me rule on this other matter.

Mr. Hornibrook: I understood you had ruled it out.

Examiner Averill: No, I was talking off the record.

Mr. Hornibrook: All right.

Examiner Averill: Gentlemen, the offer of the paper heretofore marked Commission's Exhibit No. 15, the rejection of offer is sustained and the paper will be rejected as an exhibit.

Now, read the question.

(Question read as above recorded.)

A. I have given those three that I have given you. Do you want them over again? Only those three which I have been able to find in the last twenty-four hours.

By Mr. Hornibrook:

Q. Just read them over.

A. The O. B. O. T. Laboratories, 4016 Lincoln Avenue. The Venus Reducing Cream, made by the Landin Company of 4206 Montrose Avenue, Chicago. The Health Laboratories in the Stevens Building. You will find them in the telephone book. I cannot give you the room number. They sell Nature's Way Reducing Cream.

Mr. Connor: That is a reducing cream?

The Witness: Yes. That is an obesity remedy.

By Mr. Hornibrook:

Q. Doctor, do you have before you advertising matter or letters which will enable you to testify as to whether you know others are now in business?

A. I have material before me which shows that there were several others in business at various dates this year, 1928.

Q. Give us a list of those and their addresses and their dates?

Arthur J. Cramp

A. Fayro, sold by Fayro Incorporated, Pittsburgh, Pa., had a half page advertisement

Q. Wait a minute. Now, the next one.

A. I beg your pardon.

Q. Just pick up the next one?

A. You do not want the date of the advertisement?

Q. Yes, the date of the advertisement. No, never mind aobut the date of the advertisement, but the date on which you knew they were in business.

A. I do not know whether this is legal evidence, the fact that it gives the date of the issue of the paper in which the advertisement appears.

Examiner Averill: If you saw it, that would be the date upon which you knew or heard of it.

The Witness: Yes, except that I did not see it on the actual date that the thing came out. It may have been two or three days later.

Examiner Averill: No, but you have seen it in a paper or magazine whichever it is, that bears that date?

The Witness: Yes.

By Mr. Hornibrook:

Q. Go ahead and give the date.

A. May 5th, 1928.

Q. Now, the next one?

A. Here is that Kellogg Company, an advertisement of the F. J. Kellogg Company of Battle Creek, an advertisement in the Los Angeles Sunday Times, of April 29, 1928.

Q. The next one?

A. O'Slend'O, sold by O'Slend'O Incorporated of Hollywood, Los Angeles, California in the same Los Angeles Times Sunday Magazine for April 29, 1928.

Rite-Wate vegetable compound for overweight in the Detroit News of June 11, 1928.

Q. Where is that manufactured?

A. While the advertisement does not state I know that it is sold from Detroit, because I put in evidence, yesterday I think it was, a package of Rite-Wate.

Q. Proceed.

A. Which was purchased here in Chicago.

Q. Yes. Go ahead.

A. Pyro-Pine Reducing Bath, sold by the Peerless Products Company, Inc. of Boston, and an advertisement

which appeared in the Boston Post of February 24, 1928.

Q. That is all, is it?

A. That is all I have. This is an old Rite-Wate advertisement. I do not know whether you want that put in or not.

Mr. Hornibrook: That is all.

Cross-examination by Mr. Connor:

Q. This Pyro-Pine Reducing Bath, where did you get this advertisement?

A. The Boston Better Business Bureau of Boston, Mass., sent it to me, with a request for information.

Examiner Averill: Now, gentlemen, I want to call attention to the fact that if you are going into the advertisements—the doctors testimony so far is not as to the advertisements, but if on cross-examination you are going into the advertisements then it may become necessary to accept those advertisements in this record as evidence. I do not want to encumber this record with advertisements of others than of the respondent. The testimony of the witness is solely to the question, the one single question as to whether or not there are competitors, that is, people who are selling treatments for obesity and in different parts of the United States, and that is the sole purpose for which this witness is introduced. Now, he used those to refresh his memory as to dates and as to the location, and as to the names. Of course, if you gentlemen desire to go into it, well and good, but I do not want to fill this record up with advertisements, advertising remedies or treatments of other than the respondent, because it is the statements alleged to have been made by the respondent, which statements are alleged to have been misleading, which is the subject of this inquiry. Other people may have made misleading statements, I do not know, but we certainly cannot try that in this issue.

Mr. Connor: I am not going to offer this.

Examiner Averill: I just want to be careful.

By Mr. Connor:

Q. All you know about this Pyro-Pine is that this piece of paper about six inches long and five inches wide,

was received by you in the mail from a better business bureau?

A. That is not all I know about it. I also know that the Better Business Bureau had a letter addressed to me personally stating they were enclosing this and that it was from the Boston Post, February 24, 1928, as marked, and the marks were already on the paper when I received it.

Q. You did not put this mark on the sheet?

A. No, they put that on. I assumed they put it on. It came to me that way.

Q. You do not know who put on the marks?

A. I do not know.

Q. You did not cut this out of the Boston Post?

A. No, I did not.

Q. And all you know about it is the fact you got it in a letter from a better business bureau?

A. That is not all I know about it, I told you.

Q. You know you got it in a letter from the better business bureau?

A. And I told you that this letter stated that it was—

Q. I understand that, but all you know about this is what you learned from the letter you got from the Better Business Bureau; you have no other personal knowledge of your own, have you?

A. Just what do you mean by personal knowledge? I wish you would explain. I am frank to say I do not understand it.

Q. I say that all the knowledge you have about it was what you got from a letter received by you from a better business bureau, from the contents of the letter, is that correct?

A. All the knowledge I have is what I have stated.

Q. Now, answer that question. Have you any other knowledge of your own?

A. None that I have stated.

Q. None other than the letter which you got from the better business bureau?

A. And the information that that letter contained.

Q. And the information that that letter contained?

A. Correct.

Q. That is all you got?

A. Correct.

Mr. Connor: I move to strike out the witness' testimony with regard to Pyro-Pine, for the reason that it is hearsay, irrelevant, immaterial and incompetent.

Arthur J. Cramp

Examiner Averill: The motion is denied.
Mr. Connor: Give me an exception, please.
Examiner Averill: Yes, sir.

By Mr. Connor:

Q. Let us take up your Rite-Wate. You are handing me a piece of paper about twenty-four inches long and two inches wide. Where did you get that from?

A. I am not sure whether that came to us as the whole paper and just torn out and put in our files, or whether it came torn in this form. It is not possible for me to remember the details of how each clipping comes in. We get a large number of papers in the office and we go through them and tear out patent medicine advertisements or proprietary medicine advertisements. This may be one of them.

Q. Is this all you know about Rite-Wate?

A. No, I know that I bought Rite-Wate in a store here in Chicago, yesterday or the day before yesterday.

Q. Do you know how long that Rite-Wate had been on a shelf in that drug store?

A. That particular product?

Q. Yes.

A. It looked very fresh.

Q. I say, do you know how long it had been there? I did not ask you how it looked.

A. Naturally I do not know. I have not been in that drug store continuously.

Q. And you do not know how long they had it?

A. It is impossible for me to tell that.

Q. And you do not know any more about the Rite-Wate Corporation than what you have learned from this scrap of paper, which came to you in some form or other, you do not know what?

A. Yes, we know quite a little about it.

Q. You say "we." You, I am talking of?

A. Yes, I know quite a little about it.

Q. Have you ever been over to Detroit?

A. I have been to Detroit, yes; but I have never been to the Rite-Wate Company.

Q. Do you know whether the Rite-Wate Company is a co-partnership or a company?

A. I know nothing about the company perse.

Q. What do you know?

A. I know that the Rite-Wate concern puts out an alleged obesity remedy, called Rite-Wate.

Q. How do you know it?

A. Because I have purchased it; because we have analyzed it.

Q. You purchased it and brought it into the room here, yesterday, didn't you?

A. That was one specimen for evidence here. We purchased it—

Q. How long ago?

A. How long ago we purchased it for analytical purposes?

Q. Yes.

A. I cannot recall the date.

Q. A year ago?

A. I can get that information.

Q. Two years ago?

A. I think it was about two or three years ago?

Q. Two or three years ago?

A. Yes.

Q. Then you do not know whether they have continued in business or not, do you?

A. From this advertisement which appeared in a Detroit paper—

Q. Outside of this advertisement do you know anything at all about it?

A. I have told you what I know about it.

Q. Well, do you know anything more than is shown in this advertisement and the fact you bought a package three years ago?

A. Yes. I bought a package day before yesterday.

Q. You bought that package from a local drug store, did you not?

A. Yes, sir.

Q. That is the entire extent of your knowledge and the fact that advertisement appeared in June of this year?

A. Yes.

Q. Wait a minute. I say the entire extent of your knowledge consists of the fact that some three years ago you bought a package in a local drug store?

A. I am not sure whether it was a local drug store or a jobbing house.

Q. You do not know where you got it?

A. I can find out.

Q. I say, you do not know where you got it?

A. I cannot remember at this time.

Q. And the fact you did buy a package in a local drug store yesterday for use in this room and this scrap

of paper is all you know about it, is all you know about the Rite-Wate?

A. It is not all I know about the Rite-Wate.

Q. What do you know?

A. I do not remember everything just now.

Q. That is all you can tell.

A. It may be but I know a great deal more about it.

Q. That is all you can tell?

A. I cannot recall it now, but I can refresh my memory from our records.

Q. But for the purpose of this examination, that is all you can tell us at the present time?

A. All I can tell is that there is an advertisement here from a Detroit paper in June—

Q. You do not know whether that was published in a Detroit paper, do you?

A. I do know.

Q. How do you know?

A. From the evidence.

Q. What is the evidence?

A. It speaks for itself. It is part of an entire page containing the name of the paper at the top of the page, if my eyes mean anything.

Q. I understand that is an inference that you draw from this paper, but you did not see the original paper?

A. Well, now, I draw the same inference that you are sitting here the same way.

Q. Is all you know what you draw from this scrap of paper?

A. Not all I know.

Q. What else do you know?

A. The fact I can purchase this stuff locally.

Q. How do you know that?

A. Because I have purchased it.

Q. You purchased it on the occasions that you specify, didn't you?

A. Yes, sir.

Q. And that is all you know?

A. That is all that I can recall at the present time, except the statement I have made relative to the analysis.

Q. Whether this company is now in business or in what states it does business, or how its business is conducted or anything about it, you of your own personal knowledge do not know?

A. I do not as to July 28th, whatever the date is today—1928, no.

Mr. Connor: I move that the witness' testimony in regard to Rite-Wate be stricken from the record as irrelevant, incompetent and immaterial and hearsay.

Examiner Averill: Motion denied. An exception may be noted.

Mr. Connor: Mr. Gust suggests that to save time I might state that I will make exactly the same offer in regard to all the rest of these names or conduct the same cross-examination in regard to all of the rest of these names he has mentioned and get the same answers. If that will be stipulated I am satisfied.

Mr. Hornibrook: Yes, that will be stipulated.

The Witness: There is this difference, Mr. Commissioner, in that this particular page contains two advertisements, one of Kellogg and one of O'Slend'O, already mentioned. It is from a copy of the Los Angeles Times that came to me in its entirety.

By Mr. Connor:

Q. Is your entire knowledge in regard to O'Slend'O and Kellogg gathered from this advertisement.

A. As to O'Slendo'O, yes. As to Kellogg, no.

Q. Now, what more do you know about Kellogg?

A. That I have been in correspondence with Kellogg under an assumed name at various times during the past ten, fifteen or twenty years and that we are constantly receiving requests for information about Kellogg's up until the present month.

Q. Constantly during the last twenty years. But do you know what the Kellogg concern is, whether it is a partnership corporation or individual.

A. Kellogg himself is dead.

Q. Do you know of your own knowledge?

A. What do you mean by my own knowledge? Would the Bradstreet reports that come to me by my own knowledge, or do I have to testify that I have been to the Kellogg concern—

Q. Just want to find out what you know. I do not know how you know it.

A. That is what I am trying to tell you.

Q. Did you get it from Bradstreet?

A. I got a great deal of information from Bradstreet over a period of years.

Q. Where else did you get information?

A. From the correspondence I have had with the

Kellogg Company. I got their various follow-up letters, of which we have a large file in the American Medical Association.

Q. Well, that is the extent of your knowledge is it?

A. And the fact that I think it has been analyzed and that we have that information on file, but there again I would have to refresh my knowledge, if you want details.

Q. You have no other knowledge that you are testifying to except these letters that were obtained under an assumed name, is that right?

A. Correct, and the advertisement.

Q. And as to the contents of those letters you have not got those letters here?

A. I have not got them here, no.

Q. You are just testifying in regard to the contents of letters that are not produced; that is the source of your information?

A. This is one letter—

Q. But I say you are testifying to the contents of letters, except as to this one that has been ruled out, that have not been produced, is that right?

A. I do not get the point.

Q. You are giving us information that you gathered from these letters, but you do not produce the letters, except this one?

A. Yes.

Q. That is correct?

A. Yes.

Mr. Connor: I move to strike out the testimony of the witness as to Kellogg and O'Slend'O and all the rest, for the same reason, that the testimony is irrelevant, immaterial, incompetent and hearsay.

Examiner Averill: Motion denied.

Mr. Connor: Note an exception.

Examiner Averill: Exception granted.

Mr. Connor: That is all.

Mr. Hornibrook: That is all.

(Witness excused.)

Mr. Hornibrook: That is all I have to offer at this hearing.

Examiner Averill: At this hearing?

Mr. Hornibrook: Yes.

Examiner Averill: Then, as I understand, gentlemen, from the conferences we have had in connection with the resuming of the taking of testimony in this case, it is

the desire of counsel for the Commission to introduce some testimony at Washington, D. C.

Mr. Hornibrook: Yes.

Examiner Averill: And that after the introduction of that testimony and the close of the case in chief on behalf of the Commission, that the respondents will then advise us as to a date when it will be convenient, as early as possible to go on with their testimony.

Mr. Gust: That is right.

Examiner Averill: And, as I also understand, it is not possible at this moment to state the date at which the hearings in Washington are desired, because of the necessity of conferring with the expert witnesses who are desired, so that we will therefore have to adjourn to a time and place to be fixed later by the trial examiner, due notice of which will be given counsel for both sides.

Is that correct?

Mr. Hornibrook: Yes.

Examiner Averill: Then we will stand adjourned, with that understanding.

(At twelve o'clock noon, July 27, 1928, the hearing adjourned, subject to notice.)

Washington, D. C.
Monday, September 10, 1928, 10 a. m.

The above-entitled matter came on for hearing before Hon. Edward M. Averill, Examiner.

Appearances:

Edward J. Hornibrook, Esq., for the Federal Trade Commission.

Rockwell T. Gust, Esq., and R. M. Connor, Esq., of Detroit, Michigan for the Respondent.

Whereupon, DR. LYMAN F. KEBLER was called as a witness on behalf of the Federal Trade Commission, and having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Hornibrook:

Q. Doctor, will you give your name to the Examiner?
A. Lyman F. Kebler.
Q. Where do you live?
A. Washington, D. C.
Q. What is your occupation?

A. Physician-chemist.

Q. Are you connected with the United States Government?

A. I am.

Q. I what capacity?

A. I have charge of collaborative work in what was formerly known as the Bureau of Chemistry, now known as Food, Drug and Insecticide Administration.

Q. How long have you been in charge of that work?

A. I have been connected with that work over twenty-five years.

Q. You say you are a physician?

A. I am.

Q. Of what school are you a graduate?

A. I am a graduate in medicine of the George Washington Medical school. I also hold a degree from the University of Michigan, School of Pharmacy, and literary degrees.

Q. What degrees are they?

A. The School of Pharmacy degree is called Pharmaceutical Chemist. My literary degrees as B. S. and M. S. in the literary department of the University of Michigan.

Q. How long have you been a graduate of medicine?

A. Since 1906.

Q. Give us some idea of what your duties are in the Federal position which you now hold.

A. My work consists in the examination of foods, drugs, medicines, and any other problem that happens to be brought in from some other department or office of the Government, like the Post Office Department, the Federal Trade Commission, or the Department of Justice. I review or have the drugs examined chemically. Then we look them over as to medical claims and make report on our findings to these several offices. It covers the purity of the drugs, the adulteration of drugs, the misbranding of drugs, the claiming of medicinal qualities that are not inherent in the drug or which may be inherent.

Q. Do you hold any chair in any medical school?

A. I am Associate Professor of Pharmacology and Materia Medica of the Georgetown Medical College.

Q. Are you a lecturer in any medical school?

A. I lecture in that university. I also lecture from time to time in the George Washington Medical School.

Q. Do those lectures cover the subject of obesity?

A. Yes, sir.

Q. I will ask you, Doctor, whether—

A. (Interrupting) May I just add another line of investigation I am in?

Q. Proceed.

A. The study of obesity in the community in which I live. A number of years ago requests were made to give information to the obese and overweight in the public schools and I volunteered to give a course of lectures, gymnasium work, etcetera, and in that work I have met with many, many obese persons, particularly women.

Q. Have you had classes under your direction, classes of obese persons?

A. Yes, sir.

Q. Give us some idea of the extent of that work.

A. I just tried to give it. That has been going on for a number of years. I examine patients that present themselves for the taking of the course, either by diet alone or the use of such agents as may be necessary in order to aid them in controlling their obese condition or overweight. I examine them with the idea also as to their fitness for taking the physical examinations or the gymnasium work. I oversee all the gymnasium work with a view of seeing that the persons get the right kind of exercises adapted to their condition.

Q. Have you made any special study of the drug called or known as thyroid?

A. Yes, I have.

Q. Have you noted its effect upon the human body?

A. Yes, I have thyroids under observation either in connection with cases or the application of it to patients. A number of years ago I carried out a series of tests with a view of finding out just to what extent they may be harmful or otherwise. I made that observation primarily in connection with one of the so-called obesity remedies on the market.

Q. Do you know the action of a drug called desiccated thyroid?

A. I do.

Q. Is desiccated thyroid and thyroid extract one and the same?

A. It is. There is some confusion there in the average medical mind, and properly so. Originally thyroids were administered in the form of an extract. Later on it was found that the drug itself could be more safely administered and provide for a more suitable product.

By "extract" of course we mean the removing from the drug itself of certain medicinal ingredients and applying them in that form. Usually the medical man be-

lieves that such a drug is stronger, and usually it is, than the drug itself. In the case of thyroids that confusion has come down for a number of years and the medical literature referred to thyroids, thyroids desiccated, thyroid extract, as all meaning one and the same thing, namely, thyroids desiccated.

Q. Can you tell us something about the discovery and development and history of the thyroid remedy?

A. That goes back a great many years. Dr. Horsley, of England, first made observations of this drug about previous to 1890. In 1890 he reported his results. In connection with the use of the drug for the diseases known as cretinism and myxedema, Dr. Murray of England followed him up and in 1891 made similar observations and reported his findings. At that time the use of the drug was primarily intended and worked on with the idea of its use in those two diseases I have just mentioned, namely, cretinism and myxedema—cretinism in children and myxedema in older people.

Q. May I interrupt you to inquire just what those two diseases are?

A. Cretinism in children is a condition where the thyroid may be either largely absent or has atrophied after the birth of the child and is throwing little or at least an insufficient amount of the thyroid material into the blood. It is represented in children by a dull appearance, thickness of speech, slow and inactive, even going to the degree of idiocy.

In the case of myxedema we have a similar condition regarding the thyroid except that it comes on later in life and there is infiltration of mucus or fat into the connective tissue. The adult then becomes dull, stupid, sluggish and overweight, and passing on to the stage of impaired mentality. The word "myxedema" itself means mixed mucus under the skin. The hair falls out. The patients present a most pathetic condition. The giving of thyroid is a God-send to patients of that character and the relatives.

Q. Do you care to elaborate any further on the source and development of the thyroid drug?

A. Of course I think it might be a good idea to state just exactly the value and the tremendous influence of that gland over the human body.

Q. Proceed.

A. We have here a gland located in the throat just above or adjacent to the part called Adam's apple. That gland is responsible for dullness, as I have indicated, and it is also efficacious in such conditions as a bright-

mind, an active mind. It causes blushing in women. It increases the activities, increases heart action, the intake of oxygen. It accentuates the oxidation of the blood, the circulation.

In short, I may say that the thyroid gland represents what certain mechanisms represent in the automobile. It represents the accelerator. If there is too much thyroid it accelerates the activities of the body in practically every direction. If there is too little thyroid we have the choking effect.

A thyroid, to my mind, is the greatest gland in the body. There is none equal to it although we think that the sex glands are, but we can get along without them. Without the thyroid there is no life. The thyroid is one of the most powerful drugs we have. It is more powerful than strychnine. It contains a chemical known as thyroxin which is many more times more powerful than strychnine, and the physician is usually very guarded in administering this drug and seldom does it unless he has very definite conditions which point out to him the value of thyroids in the case.

There are cases, as I have already indicated, where there is a subactivity of the thyroid. We call it hypothyroidism. Then there are cases where we have hyperthyroidism, namely, where there is too much activity. In the one case we have stupidness and enlargement of the thyroid. In the other case we have what it known as exophthalmia, protruding of the eye-balls, nervousness, the heart action increases, the nerves accelerate, the urine is augmented, and destruction of the muscles of the heart follows, and all those things which can be brought about by the administration of thyroids desiccated, and are brought about frequently by injudicious administration of it.

Q. Are there several classes of obesity?

A. Oh, yes.

Q. Name them, please.

A. They are roughly classified an endogenous and exogenous. The endogenous types of obesity are due to a defective gland or hyperactive gland. But the number of these cases is comparatively small. One writer estimates that there are not more than five per cent belonging to this group.

The thyroid is one gland that is responsible for subactivity in causing obesity. The pituitary gland is a little gland in the grain about the size of a pea. When that gland is overworked we are likely to have a very large

frame, and that activity is often responsible for the tremendous obesity we meet in childhood and the pathetic fat boy and fat girl we see.

Then we have an obesity due to the suprarenal glands. There are two little glands shaped like a cocked hat, one above each kidney, and they have another tremendous influence upon the economy and efficiency of the body. If these glands overwork, which is quite common, there is another type of obesity, then we have the obesity known as the sex obesity, namely, in those cases where the reproductive glands are removed as in eunuchism. We have it in women when the ovaries are removed. In those cases there is frequently a lack of—no, I will say an absence of the introduction of certain elements into the blood which make for greater activity than when those glands are absent. In the case of eunuchism it is well known that eunuchism usually breeds heavy, pudgy, mostly inactive people, though not always. There are some exceptions, but that is the rule. Those are the endogenous—that is, inside of the body—due to overactivity or underactivity of internal glands or the absence of them.

Then we have what is known as the exogenous type of obesity. That obesity is due primarily to excessive eating, to lack of exercise, and probably ninety-five per cent of the cases we meet are due to these two conditions.

By overeating we mean a disturbed metabolism where the ingo or the intake of food is greater than the amount used up by the activities of the body and results usually in the deposition of more or less fat. It does not mean that a given quantity of food necessarily causes obesity. In the one case a person may be very active and eat more than his brother who is less active. In the former case we have no obesity; in the latter case it may be very marked. The activity is a very, very promient feature. We get it particularly in people of sedentary habits where the abdominal muscles are not used properly. A man sitting at his desk does not exercise the abdominal muscles to a very marked degree. The same is true of women particularly during pregnancy. The result is that there is a deposition of fat over these muscles, either on the outside of the abdomen or within the abdominal cavity. These conditions must all be regulated by diet and exercise. There is no other way out of it.

There are a great many people who cannot take the exercises, but there are very few who cannot be properly handled by the use of a suitable diet. In fact, for a great

many cases of old or elderly people, say above fifty-five or sixty, it would be absolute miscarriage of justice to administer or give them physical exercises or to increase their heart activities to any extent, because the heart usually has a greater load than it can carry.

There are a great many facts that come out and as you meet these people you can see how differently the thyroid acts in the different cases and how different conditions have to be met.

There is one other thing I would like to say, and that is this: There are a great many people overweight whose overweight is not due to fatness. It is due to an impaired heart, mitral regurgitation; that is, where the blood flows back and you have a type of infiltration in the lower limbs and in other parts of the body. That is very common in heart disease.

We have the same condition arising in connection with kidney trouble. Then there is the liver frequently functioning badly, and that causes an infiltration of water in the tissues, and that type of water we call or at least I call "waterlogged tissues."

Other persons will eat too much salt, for example, and the kidneys being unable to eliminate sufficient for the salt to meet the intake, will cause a retention of a certain amount of this salt in the body, necessitating keeping within the body a certain amount of fluid to keep it in solution. For example, one ounce of salt will require about one hundred ounces of water to keep it in solution, and the tissues are waterlogged just to that extent. That is not obesity in the ordinary sense of the word, but overweight. These cases could not be influenced in the least by thyroids.

Q. I understood you to say that about five per cent of the cases of obesity are caused from defective thyroid glands. Is that the fact?

A. Internal glands in general, thyroid glands being one of them. One authority goes even further than that.

Q. That leaves of course ninety-five per cent of the cases of obesity which are brought about from other causes?

A. Excessive eating, and so forth.

Q. Thyroid, as I understand it, is a remedy that is only suitable under proper treatment for cases of obesity which are brought about by defective thyroid glands. Is that the fact?

A. Yes.

Q. So that in the 95 per cent of the cases of obesity the use of thyroid would be improper. Is that true?

A. I would not want to go quite as far as that.

Q. Explain it, please.

A. Thyroids increase the activities of the body in general. You may find a case now and then where the metabolism is under or below what we call 100. There may be a good deal of excessive fat there. If the heart condition is good, the kidney conditions are fair, and the patient is determined to lose some of that weight, the only recourse the medical man frequently has is—and if the patient will not diet and is going to do something to get rid of some of that fat, the best thing for the physician to do is to give them a little thyroid and watch what is going to develop. Some of these cases go bad with the least amount of thyroid. Others will take a large dose, depending entirely upon the character of the case.

Q. But as a general proposition the use of thyroid is not proper, is it, unless the obesity is caused from a defective gland?

A. It is not proper.

Q. I will inquire what kind of an examination should be conducted by a physician of the patient before thyroid is administered?

A. The physician should know his case. He should examine the patient physically, determine his blood pressure, the action of the heart, whether there is any defect there, the condition of the kidneys and whether there is any possibility of the urine containing albumine or sugar, and inquire into the personal habits of the patient, his age, and so forth. Those are the chief things.

Q. Would you say if the person was over sixty years of age that thyroid should not be administered?

A. I would say so absolutely.

Q. Would you say if the person was afflicted with kidney trouble that thyroid should not be administered?

A. I would not administer it, no, sir.

Q. Would you say if the person was afflicted with heart lesions that thyroid should not be administered?

A. Excessive—yes, in general.

Q. Is it not a fact that among the laiety we have people afflicted with heart lesions and kidney trouble and who do not know it?

A. Yes, sir.

Q. What would you say about administering thyroid to a person who is naturally toxic?

A. "Toxic" of course is a rather broad term. A

toxic condition may result from constipation. As a general proposition, I would not advise against the use of thyroid in a toxic condition.

The word "toxic" goes very far. For example we have a toxic condition following typhoid fever where the patient, after convalescence, will even take on an increase in weight. There is a toxic condition causing that increase in weight. What it is exactly we do not know. In the case of lead poisoning we frequently have a toxic condition. There is always a toxic condition due to lead. Other toxic conditions result from a lack of proper functioning of cells of the body. In the case of arsenic we have a toxic condition frequently causing an increase in weight and deposition of fat. Thyroid would be of no value in those cases; it would be useless.

Q. Would it be injurious?

A. It might be, yes.

Q. There is a condition known as hypothroidism, is there not?

A. Yes, sir.

Q. That is called goitre?

A. "Hypo" means under, not enough secretion. "Hyper" means over or too much secretion. Yes, there is such a condition known as hypothroidism and it is a condition commonly associated with what we call the common goitre.

Q. Is it proper to administer thyroid in such condition as that?

A. Not unless we know the condition of the patient. We meet these cases quite frequently. For example, here is a patient that has an enlarged, slightly bulging thyroid, rapid heart, nerves are at tension, overweight. These same conditions might come from tuberculosis, or it may be just a case of nerves. Sometimes we have what appears to be an enlarged thyroid which we may think may be due to a lack of iodine in the food—I will come to that in a moment—when as a matter of fact it may be due to a nervous condition. That is common met with in pregnancy and during the menstrual period of women. The food there is just as well supplied with iodine previous to these periods and after them as during these periods, and yet we frequently have an enlarged thyroid during these periods, and nervousness. Rapid heart is another factor in these conditions.

Q. You said in substance that overweight may not be due to the fat, but it might be due to kidney trouble causing too much water in the body.

A. Yes.

Q. Such cases would not be affected by the thyroid drug if it were administered and the administering of the thyroid would not be proper, would it?

A. It would not be effective, and on the other hand it might be absolutely harmful.

Q. Is it not a fact that in every heart case where there is a back-flow of blood, there is overweight?

A. I could not go as far as that. In many cases there is. There may be a moderate degree of backflow of blood, and yet there may not be any overweight. We have these cases. But when it is well established, when the back-flow is sufficiently accentuated to have a marked influence upon the flow of blood through the tissues, then we have what is known as a dropsical condition of various parts of the body, chiefly of the lower limbs, and it may be present to a certain extent in the abdominal walls.

Q. What would you say in the case of such a case as you have just described of the administering of two grains of thyroid per day over a period of from sixty to ninety days?

A. I would consider it harmful. The heart has all it can carry already.

Q. What would you say about administering such a dosage in the case of kidney trouble?

A. I never would administer it. Thyroid acts unfavorably on the kidneys, frequently destroying some of the tissues, and there is enough of the tissue already gone, and you do not want any more destroyed.

Q. Would the administering of such dosage for such a period of time be dangerous in the case of diabetes?

A. I would not want to say that it was or was not. I have not detailed information on that point. Of course you recall that diabetes is not due to kidney trouble.

Examiner Averill: Doctor, if you do not know, there is no use of going further. I mean, if you do not know from your own study and research and practice what the effect upon a diabetes patient would be of this drug, just say so and let us go on to something else.

By Mr. Hornibrook:

Q. What would you say about administering that dosage for that period of time in the case of heart lesions?

A. Thyroids are always harmful in heart lesions.

Q. What would you say about the administering of a dosage of that amount for that period of time in the case of a person sixty years or more of age?

A. I consider it harmful. I never would administer it.

Q. Would it make any difference if that dosage of two grains a day for a period of sixty to ninety days, was given four times a day in half grain tablets, one following each meal and one before retiring?

A. It would not make any difference when it was administered just so they got the amount of dosage in the given period of time. Some observers believe that thyroids are even cumulative.

Q. Are you familiar with a proprietary drug or anti-fat medicine known as Marmola?

A. I am.

Q. Have you seen the formula of Marmola?

A. Yes, sir.

Q. Is Commission's Exhibit No. 4, now before you, a true and correct copy of that formula?

A. That I could not say. I have never seen the quantities given here. This is the first time I have seen the exact quantities.

Q. Assuming that is true, I will ask you to look through the formula, Commission's Exhibit No. 4, and state whether or no there is any remedy there other than thyroid and the physic which is set forth there, which is efficacious in the reduction of flesh in the human body?

A. No.

Q. Just what is Extract of Bladderwrack?

A. Bladderwrack or seaweed contains a small amount of iodine compound.

Q. Will you go on down through the formula and tell us what those drugs are in plain English, if you can?

A. The iodine in the bladderwrack supplements to a certain extent the iodine compound action in the thyroid gland. The exact nature of iodine compound in bladderwrack we do not know. The iodine compound in the thyroid is known as thyroxin. It was isolated a number of years ago by the Mayo Clinic, and we know it very well. The iodine in the bladderwrack supplements, as I said, the action of the thyroid. One grain of extract of bladderwrack means approximately four grains of the seaweed itself.

Phytolacco is common pokeroot, known to almost everybody. The drug itself is a powerful laxative. It is an unsafe laxative in many ways, because the physician

never knows what it is going to do and for that reason it has practically been eliminated from the Pharmacopoeia.

Exaract of cascara sagrada is commonly known to the laiety as cascara. It is a laxative. It acts primarily on the large bowel by irritating the internal lining of the bowles, causing a flow of water from the tissues of the body into the large bowel and resulting in a movement which may be actually diarrhea.

Desiccated thyroid I have explained rather fully.

Phenolphathalein is another laxative drug which acts in practically the same way that cascara does excepting it is not quite so drastic.

Oleoresin ginger is what might be called a stomachic influencing favorably the digestion of food and to that extent I think is a factor in the so-called diet fat reducing scheme.

Powdered saccharum special simply means powdered sugar.

Calcium carbonate is precipitate of chalk. That is the common name for it. It has no value in the treatment of obesity and no value especially excepting that it might reduce a certain acidity in the stomach and have some influence upon the so-called acidosis of the body which is rather common in obesity.

Methyl salicylate, oil of anise and oil of sassafras are simply added for the purpose of giving flavor, and by the time the tablets are finished there is very little of those ingredients in them unless very great care is taken in the method of preparation. There is some left, but not enough to have any medicinal effect and their purpose is not to have any effect.

Talcum brown—I do not know talcum brown, but talcum is the common name for powdered soapstone.

Ivory black is used as an agent to bring the tablets up to a certain color, which is easily done.

"Aqua for extracts." "Aqua" means simply water used in the preparation of these extracts which I have just named.

Powdered burnt umber is coloring matter.

Red oxide of iron is the same thing.

Syrupus simplex is common syrup used for putting coating on these tablets. I do not know whether these tablets are coated or not. If they are not, the syrup is used simply as a vehicle to help bind the material together.

"Lubricating solution"—I do not know the nature of

that. It may be syrup. It may be petroleum, petrolatum, or some of those things.

"Aqua for granulating." That is water used to moisten the material the material to put it in proper form for granulating and subsequent compressing into the tablets.

"Liquid petroleum colorless" is a name for mineral oil. Everybody knows what that is. A great many people have used it as a laxative.

The action of this whole prescription is the action of the laxatives, cascara sagrada, phenolphthalein, bladderwrack, phytolacca and the thyroid. The phytolacca and the cascara sagrada and the phenolphthalein act along the same general lines. The bladderwrack and thyroids act along the same general lines. The cascara and phenolphthalein are of course laxatives.

Q. You have named two laxatives there, have you not?

A. Yes—three. Phytolacca is a laxative.

Q. I will ask you to state whether or no if Marmola containing the laxatives set forth in the quantity stated there in Commission's Exhibit No. 4, were taken for a period of from sixty to ninety days, it might create in the patient or in the person who took it the laxative habit?

A. It certainly would. As a matter of fact, a good many patients have to give up taking Marmola because of this.

Mr. Gust: I object to that, it being wholly incompetent.

Examiner Averill: Yes, that part is at present. At this stage we will have to strike particular part of the remarks about Marmola.

The Witness: I did not mean to say Marmola.

By Mr. Hornibrook:

Q. Are you familiar with a laxative known as dilaxin?

A. Yes, I am familiar with that.

Mr. Gust: I object to the inquiry into the subject of dilaxin. There is nothing in the complaint before the Commission regarding dilaxin. We are not tendered any issue on that subject. We are not complained against because we sell it or for anything

that is said about it. That is a different prescription and a wholly unrelated subject to this inquiry.

Mr. Hornibrook: It is recommended that this laxative be taken in conjunction wilth the other laxatives which are in Marmola.

Examiner Averill: You mean the directions for use recommended that the dilaxin be taken in conjunction with the Marmola tablets?

Mr. Hornibrook: Yes.

Examiner Averill: I think in view of that you may inquire. As far as this question of the effect of laxatives is concerned in quantities, and so forth, it is proper. The objection is overruled and the question may be asked.

By Mr. Hornibrook:

Q. What is dilaxin?

A. It is a laxative.

Q. Assuming that that was taken by a patient in accordance with directions which read as follows:

"Adults should take one to three tablets according to individual needs. Some need a little dose, some a larger dose, depending on conditions. You will quickly learn. Take the tablets at night followed by a glass of water. You will find in dilaxin the modern laxative at its best."

Assuming that was taken by a person along with Marmola in accordance with the directions given here, would that tend to increase or decrease the chances for a person becoming afflicted with what is known as the laxative habit?

A. It would increase it.

Q. What would you say whether or no that is the same? Is that made of the same laxatives that are set forth in the formula, Commission's Exhibit No. 4?

A. Yes, sir.

Q. Do you know a certain Dr. Kellogg, of Battle Creek, who puts forth an anti-fat cure?

A. He is not a doctor. I have known the party.

Q. I just want to know whether the institution of which he is the head is now in business?

A. Yes, it is in business; that is the Kellogg treatment for obesity.

Q. Do you know how it is put forth and how it is put on the market?

A. I am not quite sure about that at just this minute.

Q. What is it? Is it a set of directions or is it a medicine or a food or what?

A. It is a medicine.

Q. Do you know whether it is sold in States outside of the State of Michigan?

A. Oh, yes; it is sold all over the United States.

Q. Do you know anything about an anti-fat remedy or drug called "Fat-off"?

A. Yes, sir.

Q. Where is that produced?

A. It used to be made in New York.

Q. Do you know whether it is made now?

A. I have no knowledge on that score.

Q. Do you know of a remedy called "Take-off"?

A. Yes.

Q. Where is that made?

A. It used to be made in Hollywood, California. It is now being manufactured by a firm in Chicago.

Q. Do you know whether it is sold in the different States of the United States?

A. It is.

Q. Do you know of any other anti-fat remedies that are now being sold in the different States?

A. Yes; "Rite-Wate" in Detroit is one.

Q. Name a few of them.

A. Dr. Newman, of New York, is another. There are quite a number on the market, but they do not just come to my mind.

Q. That is sufficient. Assuming that Commission's Exhibit No. 4 is the formula from which Marmola is made, may Marmola be safely taken two grains every day for a period of from sixty to ninety days by persons without first being examined and then under the direction of a physician?

A. I think it would be very unwise.

Q. Would it be safe to do it?

A. In some cases it may be and in other cases it may be distinctly harmful.

Q. Will four Marmola tablets—that is, one-half grain four times a day—reduce excess fat in all persons?

A. No.

Q. In some persons it will not affect excess fat at all.

A. Those persons whose thyroid may be under-functioning, and the little thyroid that is added in this case

may actually increase it. There are other cases where obesity is not due at all to any hypo-functioning of the thyroid as in overweight, and may be due to the action of the pituitary or the suprarenal gland. Those persons who have in them an element of this in their system, it would not do any good; that is, there would not be enough there to do them any good.

Q. Is it possible for Marmola to reduce fat and yet at the same time build up muscle or sinew?

A. No. Marmola destroys the muscular tissue.

Q. What do you say as to two grains of thyroid administered for a period of from sixty to ninety days having any effect upon the nervous system?

A. In cases it would be distinctly harmful and accentuate nervous conditions.

Q. Can Marmola reduce in the average person at the rate of a pound per day for a period of from sixty to ninety days without doing the patient harm?

A. No, sir. It is impossible.

Q. If obesity is due to defective pituitary glands, Marmola would not be a proper remedy, would it?

A. Absolutely worthless.

Q. The liver is the largest gland in the body, is it not?

A. Yes, sir.

Q. When that is defective, overweight and dropsy sometimes result, do they not?

A. Yes, when the circulation is defective, when there is improper blood supply.

Q. In cases of that kind would thyroid be the proper remedy to administer?

A. No, sir.

Q. Is it not a fact that some persons may be fat and yet have a normal thyroid gland?

A. Yes; there are a great many.

Q. Would the administering of thyorid in a condition of that kind be proper?

A. I would not consider it so, no, but in certain cases that I have indicated a physician might and probably would give thyroid in order to palliate the feelings of the patient.

Q. Is it not a fact that the heart muscles might be affected by the administering of two grains of thyroid for from sixty to ninety days?

A. Yes, sir; not only the heart muscles, but other muscular tissue.

Q. Where a reduction of weight or fat has been

brought about by the administering of thyroid and then the administering of thyroid is discontinued, is it not a fact that the patient will immediately begin to take on fat again?

A. Soon after stopping its use, yes.

Q. So that if one is to remain at his desired weight, he will have to continue the taking of this thyroid for a long period of time or else adopt exercises or some other method of fat reduction?

A. Yes, sir.

Q. Some people can take a great quantity of thyroid, can they not?

A. Yes, sir.

Q. And some very little?

A. Yes, sir.

Q. What would you say was the smallest dose that might be injurious to a person?

A. The literature records the taking of a quarter of a grain resulting very harmful.

Q. I want to ask some hypothetical questions and they may cover some of the ground you have gone over in your examination. Assuming, Doctor, that Marmola, containing the drugs and in the quantities set forth in Commission's Exhibit No. 4, is given to a person four times a day over a period of from sixty to ninety days, I will ask you to state whether or no that preparation and those directions are the result of and are based upon scientific research, knowledge and accuracy?

A. That is rather a difficult question to answer. May I have the question read?

Examiner Averill: Mr. Reporter, will you read the question?

(The pending question was read by the reporter.)

A. Not the dosage. May I explain my position there?

Mr. Hornibrook: If he desires to do so, but I think it is perfectly plain. Whether or no he is to be permitted to explain his answer rests entirely with you, Mr. Examiner.

Examiner Averill: As I understand it, the witness says that the question is an exceedingly difficult one to answer as it involves several angles which render it difficult. But in connection with the dosage, as stated, he gave us his opinion that the dosage was not, I think his language was, scientifi-

cally arrived at or something to that effect. Is that the idea?

The Witness: That is correct.

Examiner Averill: So I do not think there is anything else to explain.

By Mr. Hornibrook:

Q. Doctor, I will ask you to state, bearing in mind in all these questions this formula set forth in Commission's Exhibit No. 4, whether or no in your opinion its medical properties are safe, pleasant and effective in their action in the removal of excess flesh from the human body?

A. No; that is not a corrct representation.

Q. I will ask you to state whether or no in your opinion the same may be used by purchasers thereof without discomfort, inconvenience, or danger of harmful results to the physical health of such users of such compound?

A. Not as a rule, no. There may be cases.

By Examiner Averill:

Q. There may be cases which way?

A. There may be cases in which it may not harm.

By Mr. Hornibrook:

Q. I will ask you to state whether the giving of Marmola in dosages of two grains a day is a scientific method for the treatment of obesity?

A. It is not.

Q. I will ask you to state whether that formula, Commission's Exhibit No 4, will act with a reasonable degree of uniformity upon the bodies of all users thereof?

A. It will not.

Q. I will ask you to state whether it will be sufficient to be generally effective for the reduction of the excess flesh of the users thereof without impairing the health of a substantial portion of such users and without the danger of bringing to such substantial portion injurious results to the physical health?

A. No.

Q. I will ask you to state whether these Marmola tablets, following the directions as heretofore indicated, may be safely used by any individual purchaser thereof without previous consultation with a medical adviser?

Dr. Lyman F. Kebler

A. There may be some cases, but as a rule, no.

Q. Is this not the fact, that thyroid when introduced into the human body is a powerful agent, liable at all times to produce changes or conditions that will be harmful to the users thereof?

A. Yes, sir.

Q. And is this not the fact also, that such harmful changes may be safely guarded against in any case only by the previous and continuing investigation, observations and advice of a competent physician?

A. That is correct.

Q. Is this not the fact, that even the use of thyroids for the reduction of excess flesh under the directions of a competent physician is fraught with possible injury and calls for competent professional observation, medical skill and care?

A. Yes, sir.

Q. What do you say to this: After the directions, "Take Marmola from sixty to ninety days," then follows this statement: "Stop when you are satisfied. Then if you start to gain again, take Marmola a while longer." What would you say as to following out those directions being dangerous or otherwise?

A. I think it would be unsafe.

Q. Is there any rule that applies to all persons as to the number of pounds per day which can be safely removed from the patient in a process or treatment of reduction?

A. No, sir.

Q. So that with one person it might be safe to reduce a pound a day and with another person it might not be safe to reduce half a pound? Is that correct?

A. That is correct.

Q. Is the concensus of opinion to this effect among the physicians, that the dosage recommended for Marmola if taken regularly seems best fitted to the average case?

Mr. Gust: I object to the doctor telling what the concensus of medical opinion is. I have no objection to his own opinion.

By Mr. Hornibrook:

Q. For the present I will withdraw the question and ask you, Doctor, if you know what the consensus of opinion of the medical fraternity is?

A. I know the literature very well.

Dr. Lyman F. Kebler

Q. I will now ask you, Doctor, is the consensus of the opinion to this effect among physicians, that the dosage recommended for Marmola, if taken regularly, seems best fitted to the average case?

Mr. Gust: I make the same objection. The doctor is incompetent.

Examiner Averill: I see no objection to the doctor giving his opinion based on the literature which he says he has studied extensively as to the effect of the dosage. I see no objection to his stating what he finds the literature states, but I do not see how he can undertake to give an opinion as to concensus of the opinion of the medical fraternity. He can give his own opinion as to the effect of certain dosages and he can state what he finds the majority of the literature states as to the effect of them.

By Mr. Hornibrook:

Q. What does the majority of the literature state as to what?

A. May I have the question read now?

Examiner Averill: Will you read the question, Mr. Reporter?

The Reporter (reading): "I will now ask you, Doctor, is the concensus of the opinion to this effect among physicians, that the dosage recommended for Marmola, if taken regularly, seems best fitted to the average case? What does the majority of the literature state as to that?"

Mr. Gust: Do you mean to ask, Mr. Hornibrook, what the majority of the literature the doctor has read states?

Mr. Hornibrook: Yes.

Examiner Averill: In other words, as I understand it, what he is seeking to ascertain from the witness is whether, from his experience and from his research in literature, the majority of that literature bears out an assumption that the dosage in each case must be fitted to the individual after examination and study of the particular patient to whom the dosages were to be administered. That, I understand to be the point of the question.

Mr. Hornibrook: I will withdraw the question.

Examiner Averill: Very well.

Dr. Lyman F. Kebler

By Mr. Hornibrook:

Q. Do you know whether, in your opinion, the dosage recommended for Marmola, if taken regularly, is best fitted to the average case of obesity?

A. No, it is not.

Q. Is the use of Marmola alone in cases of obesity a scientific remedy?

A. It is not.

Q. Doctor, would you say that the taking of thyroids of one-half grain doses four times a day for a period of from sixty to ninety days would increase vitality?

A. No.

Q. Doctor, what would you say of this as applied to Marmola: "It reduces fat by correcting the gland cause without abnormal exercise or diet." Would that be a correct and proper treatment for obesity?

A. Not as a general proposition, no. There may be a few cases.

Q. I will ask you whether it is proper and safe during treatment for obesity, a treatment involving the use of thyroid, to prescribe the same diet for all people?

A. No; it is absolutely incorrect.

Q. Is it safe and proper to prescribe the same exercises and the same amount of exercise for all people during such treatment?

A. No, sir.

Mr. Hornibrook: You may take the witness for cross-examination.

Examiner Averill (after discussion off the record): It seems to be convenient and agreeable that we take a recess at this time until one o'clock. Accordingly that will be done.

(Thereupon, at 11:35 o'clock a. m., a recess was taken until 1 o'clock p. m. of the same day.)

AFTER RECESS.

The hearing was resumed at 1 o'clock p. m.

Whereupon, DR. LYMAN F. KEBLER, the witness on the stand at the time of taking the recess, resumed the stand and testified further as follows:

Cross-examination by Mr. Gust:

Q. Doctor, you say you are in private practice?

A. Some.

Dr. Lyman F. Kebler

Q. Where is your office?

A. 1322 Park Road.

Q. Is that where you live?

A. Yes, sir.

Q. How much of your time is taken up by your Government activities?

A. Seven hours a day.

Q. What practice you do is after the usual Government hours?

A. Yes, and what practice I do for the Government, Department of Agriculture, is on Government time.

Q. What practice you do for yourself is taken up after your regular Government day?

A. Yes.

Q. You have some pay patients?

A. A few.

Q. Can you give us any idea about how many?

A. Not many. I do not make any living out of it.

Q. Can you give us any idea how much—

A. (Interrupting) No, I do not think it is necessary.

Q. Regardless of whether it is necessary or not, do you think you could?

A. Sure I could.

Q. How many do you think?

A. I do not think it is necessary to say. It depends entirely on what you call private practice.

Q. I am asking about how many pay patients you have a day.

A. I do not have many pay patients.

Q. How many?

A. I do not think it is necessary to answer that question. I am telling you I give most of my time to Government work, and that is where I have devoted my life.

Q. Unfortunately you are not the judge of whether it is necessary to answer or not. I would like to know how many pay patients you see each day.

By Examiner Averill:

Q. If you can give an estimate of it, give it. He is not asking you the amount of money or anything of that sort. He is just asking for the number of patients.

A. Oh, probably one or two a day.

By Mr. Gust:

Q. One or two a day?

A. Yes, average.

Q. Do you specialize in any branch of medicine?

A. Yes.

Q. What branch?

A. Nutrition.

Q. What do you include in the term "nutrition"?

A. Obesity, diabetes, any of the diseases known as deficiency diseases, and tuberculosis. In fact, I was connected with a tuberculosis sanitarium outside of Washington here for a year and a half—primarily internal medicine.

Q. What do you classify as deficiency diseases?

A. Pellegra, beri-beri—I do not mean beri-beri, because I do not handle beri-beri; but diseases where there is a deficiency in certain food elements; for example, acidosis, which is a very common ailment, an adjunct to many diseases, is entirely handled by the giving of proper food. For example, most of us live on acid producing foods, such as eggs, and so forth.

Q. You are going beyond my question.

A. Might I finish? That is a deficiency disease. I am answering you.

Q. But the question did not contemplate "for example, some people do this or that." However, I am quite willing you should name deficiency diseases, but beyond that I have not asked anything.

A. You can put it any way you want to and I will answer it.

Q. I would like to have you put it the way you want to. I would like to know what deficiency diseases you mean.

A. I have told you.

Q. That is all of them?

A. I do not know whether it is or not.

Q. That is all you think of at the moment?

A. Yes.

Q. Do you have a machine for measuring the basal metabolic rate of your patients?

A. No, sir, I do not.

Q. You do not have such a machine?

A. Somebody else does that.

Q. Have you used such a machine?

A. No.

Q. Never had one?

A. No. That is not in my line of work.

Q. That is not in your line of work?

A. Somebody else does that.

Q. Have you used thyroids in your practice?

A. Sometimes.

Q. Have you ever prescribed thyroids for any of your pay patients?

A. Yes.

Q. Have you ever prescribed it for obesity?

A. Yes.

Q. How much thyroid have you ever used in your entire practice?

A. Very little.

Q. Just give us an idea of how much.

A. I do not prescribe one case in ten.

Q. How much thyroid have you ever prescribed in your entire private practice?

A. I do not know.

Q. How much do you think you have prescribed?

A. I do not know.

Q. Have you any idea?

A. No.

Q. To how many patients have you ever prescribed it?

A. I do not know; not very many; probably not over ten. I do not consider it a safe drug.

Q. You have not prescribed it to over ten people?

A. Probably not.

Q. Those ten people were pay patients of yours?

A. No, sir, not all of them.

Q. Were any of them pay patients?

A. They may have been.

Q. Were they? Do you know?

A. I do not recall.

Q. Do you recall any instance that you ever prescribed thyroid to any pay patient?

A. Where I got money from them?

Q. Yes.

A. I do not recall any just now, no.

Q. But you do recall having prescribed it to some patients, possibly ten? Is that it?

A. Yes.

Q. What dosage do you prescribe?

A. It depends on the case.

Q. In what dosage do you prescribe it or did you prescribe it to the ten patients?

A. I do not know. I would have to look up the records.

Q. Have you any idea of the amount of dosage you used in those ten cases?

A. I have given them from a quarter of a grain up fifteen grains a day.

Q. You think you have given it within those limits?

A. Yes.

Q. From a quarter of a grain to fifteen grains a day.

A. Yes.

Q. Do you know the dosage stated in the U. S. P.?

A. It depends on which one you have reference to.

Q. Let us take the latest one.

A. One grain.

Q. Was there a difference in some others?

A. Yes, sir.

Q. It used to be a grain and a half to two grains?

A. Yes, and in 1910 it was a grain and a half, and in 1990 it was four grains.

Q. In 1990 it was four grains?

A. Yes, in 1990 it was four grains.

Q. We have not reached that year yet—1990.

A. I mean 1900.

Q. Is that a daily dose or a dose three times or four times a day?

A. Average dose.

Q. I mean average daily dose or average dose to be given three or four times a day?

A. What the publication says is the average dose. That may be given once or twice or three or four times a day, or four times a day, depending upon the wishes of the physician.

Q. In those ten cases which you think you have prescribed thyroid, did you prescribe it to any of them for obesity?

A. Yes.

Q. You did?

A. Yes, I did.

Q. Do you recall the dosage you prescribed?

A. No, not any more than I have already indicated.

Q. Were those patients under any other physician's care except yours.

A. They may have been. I do not know.

Q. So far as you know?

A. They may have been.

Q. Do you know whether they were or not?

A. No, I do not.

Q. I believe you said that thyroid was first commented upon by Dr. Horsley about 1890?

A. Yes. I think he was one of the earliest observ-

ers. There may have been earlier observations, but he was one of the earliest ones that used it to any extent.

Q. It has been used ever since that way by the medical profession, has it not?

A. Yes, more or less. Originally, it was not used in myxedema and cretinism. Later on it was used in obesity.

Q. I suppose the ideas of the medical profession have been changing somewhat in the use of thyroids from time to time?

A. Yes.

Q. The same as a great many other medical ideas, their opinion has been revised from time to time?

A. I am pleased to say that the medical profession is making advancements.

Q. And making advancements in thyroid as well as in everything else?

A. Oh, yes.

Q. The introduction of thyroid increases the basal metabolic rate of the human body, does it not?

A. That is one factor, yes.

Q. It does do that?

A. Yes.

Q. Does it do anything else?

A. Yes, it destroys tissues.

Q. How does it destroy them?

A. It acts upon the muscles and breaks them up.

Q. How?

A. By deteriorating them.

Q. How does it deteriorate them?

A. It destroys the tissues, oxidizes them.

Q. Is that what raises the B. M. R.—basal metabolic rate?

A. That may be one of the factors.

Q. What do you mean when you speak of the basal metabolic rate?

A. The basic metabolic rate—to go into it in detail would be a long story—is a standard that has been developed as the result of long experiment and is based in part upon the amount of oxygen taken into and the amount of carbon dioxide given off under certain conditions. I want to say plainly that I am not specially conversant with the system employed, because that is not my line of work. I can talk on metabolism, but I think the question of the metabolic rate is still in flux.

Q. You think it is still what?

A. In flux.

Q. By that you mean what?

A. That it is changing.

Q. That is, their ideas about measuring the basic metabolic rate are continually changing?

A. Yes.

Q. And the ideas of the profession about measuring it are continually changing?

A. I do not think it is the idea of the profession, because the men who are engaged in that line of work are very few and the average medical man is not conversant with the details of determining the metabolic rate. He knows it in a general way. That is a specialty and reserved for those men who handle that work.

Q. But you think those details are being changed?

A. Yes, I know they are changing. Dr. Bubois is in that work, of Johns Hopkins, and he has been very materially advised in the last ten years.

Q. I think you compared the human body to an automobile.

A. In just one particular.

Q. In one particular, though?

A. Yes.

Q. Do you drive an automobile, Doctor?

A. No; I pay for the driving of one.

Q. You said the giving of thyroid was comparable to stepping on the accelerator of an automobile?

A. I did not say that.

Q. You did not say that?

A. No, I did not say that.

Q. You said the giving of thyroid acted the same as stepping on the accelerator of an automobile?

A. I said the thyroid acted as an accelerator and a chocker both, depending upon the nature of your thyroid.

Q. When you step on the accelerator of an automobile you give it more gas, do you not, Doctor?

A. Yes.

Q. Is not that all you do?

A. But that is not the only point I had in mind when I made that statement.

Q. In order that we may understand that situation, you know that by stepping on the accelerator of an automobile all you do is to increase the supply of gasoline to the carburetor?

A. No, not necessarily.

Q. It is not?

A. No.

Q. What else do you do?

A. You increase the oxygen.

Q. You do not change the mixture any in the car, do you, Doctor?

A. You may and you may not, but if you increase the gasoline you would stall your engine.

Q. You increase the fuel that you are giving the automobile, the gas?

A. And the oxygen.

Q. The mixture of air plus gasoline is what you increase, is it not?

A. That is what we are getting to. You said increase the gasoline. I said no, you add the oxygen.

Q. I think you misunderstood me. I said increase the fuel.

A. Oxygen is not usually considered fuel.

Q. Perhaps I misquoted you. What I am trying to get at is that you did not mean to infer that by giving thyroid you add any more fuel in the human body?

A. No, but you use it up, you oxidize it.

Q. You add more oxidizing agents; is that it?

A. Yes. The thyroids increase the amount of intake of oxygen, just the same as you increase the oxygen in your automobile by stepping on the gas. You increase the circulation of the blood, you carry oxygen to the blood to oxidize the tissues or the food material, whatever it may be.

Q. A simile has been given in this proceeding that you do the same thing you do when you open up the draft in a furnace. Do you think that is a fair example?

A. That is a good comparison; that is all right.

Q. Thyroid furnishes the draft for the burning of the food?

A. It increases it, I would say. It does not furnish it. It increases it.

Q. So that when you take thyroid into the human body you have more draft and you consume more fuel?

A. The draft may be increased and you may have more consumption of fuel, yes.

Q. That is what I mean to say. What is the action of the thyroid when taken into the human body? You say it increases the draft and you burn up more fuel. I wonder if you could elaborate that a little further and tell us what that means.

A. The degree of oxidation is simply increased. If you have a slow burning fire and you add oxygen to it and fan it, you increase the combustion or the rate of

combustion, and that is exactly what you have when you add thyroid to the human body.

Q. The thyroid increases the basal metabolic rate of any body, does it not?

A. No, not necessarily.

Q. It does not?

A. Not necessarily, no. It may and it may not.

Q. It does that as a rule, does it?

A. Oh, yes, but you make your question too broad.

Q. You would say it is the general rule, but there might be exceptions?

A. Yes, a good many exceptions.

Q. When you increase the metabolic rate the person tends to lose weight, does he not?

A. Not necessarily.

Q. That follows as a general rule?

A. Yes, that is right.

Q. And the loss of weight is proportional to the amount of thyroid administered, as a general rule?

A. All things being equal. No, I would not make it a general rule. For example, you give a person thyroid and give them plenty of food to eat and increase the supply, there may not be a bit of decrease in weight. In fact, there may be an increase.

Q. I mean if a person continues the same amount of food, the same amount of exercise that he did before the administration of the thyroid, then the loss of weight will be proportionate to the amount of thyroid taken, as a general rule?

A. That may be true, yes.

Q. I understand, Doctor, that fat in the human body is more combustible than most other tissues?

A. Fat in principle is not a tissue. It is simply an accumulation of fatty material in the connective tissues. No, fat is not more easily combustible than some other foods.

Q. For instance, what?

A. Sugar. Sugar is the most combustible material we have.

Q. What is the next?

A. In the first place, your fat has to be, according to some authorities, converted into suggar before it is usable. Then it can be oxidized. Fat probably comes second to sugar.

Q. Second to sugar?

A. Yes, to the carbohydrates. Let me put it that

way. Sugar is simply one name for a group of substances which could be called the carbohydrates.

Q. So it follows, does it not, that after the excess amount of sugar in a given amount of food is consumed from thyroid medication, the next thing to go would be the fat?

A. That is correct, provided there is not enough sugar there, but if the person has enough to eat, they have plenty of sugar there without going after the fat. There is one of the troubles with these people. They eat too much sugar and the fat is not burned up.

Q. You prescribe a diet for you obesity patients?

A. Oh, yes, sure.

Q. Do you prescribe a diet which is largely composed of protein?

A. Protein is one of the factors, yes.

Q. You have what is commonly called a high protein diet?

A. No, what I would use is a high protein diet to begin on, to get the patient accustomed to diet, and then I go to the medium protein diet.

Q. Doctors differ on just the amount of protein and just the proper diet that they consider the most effective, do they not?

A. I think not.

Q. You think not?

A. I think there is a pretty general understanding as to what kind of diet will reduce and the amount of diet. It depends on the doctor. Some physicians work on the basis of calories. Others work on the basis of letting them have low calory foods and have as much as they want.

Q. So you think it is pretty well agreed in the profession that they have a sort of standard diet for obese people?

A. Yes; that is the average. You could not give the same diet to all people.

Q. We have an exception to every rule in medicine, have we not, Doctor?

A. That may be true, yes. People all differ.

Q. You advise your patients to avoid sugar and sweets?

A. Yes, cut it down to a minimum.

Q. And also avoid fats?

A. Yes, cut out fats as far as possible.

Q. Assume that a patient is on this average general reduction diet and thyroid is administered, will he not

consume his fat after he has consumed what excess sugar may be present?

A. He may, yes. He may consume other things, too.

Q. That is the general rule, that he will start to consume first the sugar and then the fat?

A. Yes, I think that is fair.

Q. You made the statement that thyroid as a drug was many times more powerful than strychnine.

A. Yes.

Q. How much strychnine can a person take at any one dose?

A. That depends on the condition of the patient.

Q. What is the average dose that would be considered dangerous, apt to kill anybody?

A. A lethal dose?

Q. Yes.

A. There is no such standard.

Q. There is no average lethal dose?

A. A grain may kill and two grains may not kill. It depends on the patient.

Q. What is usually regarded as an average lethal dose of strychnine?

A. I would not want to say that there is any average lethal dose. I do not know of any average lethal dose. I know the average dose of strychnine.

Q. What is that?

A. We give about one-twentieth to one-thirtieth of a grain.

Q. Would one-twentieth or one-thirtieth of a grain of thyroid be a lethal dose?

A. No. I am not talking about a lethal dose.

Q. What is a lethal dose of thyroid?

A. I do not know, any more than I know in the case of strychnine.

Q. You have given as high as fifteen grains of thyroid?

A. In certain cases.

Q. Did you ever give fifteen grains of strychnine?

A. No. The thyroid acts in an entirely different way from strychnine. Thyroid acts by destroying the patients. Strychnine acts by killing the patient if given too much. It acts on the nervous system. That also increases the metabolism, as strychnine does.

Q. You said the thyroid was more powerful.

A. So I do say, according to the way I understand it. It destroys tissues, and strychnine does not.

Q. Strychnine destroys the patient?

A. If you give enough of it, yes.

Q. The same amount of thyroid would not destroy the patient, would it?

A. Taking the active agent in thyroid, yes. Thyroxin would destroy the patient. Thyroxin is more powerful than strychnine.

Q. We were talking about thyroid, desiccated thyroid, for the moment.

A. I know it. I stick to what I said. Thyroids are more dangerous to the average individual than strychnine, because it destroys the tissues.

Q. And all the strychnine does is to kill them?

A. Not if you give restricted doses. Many people take strychnine and do not get killed.

Q. And many people take thyroid and do not get killed?

A. That is true.

Q. When you say thyroid is more powerful than strychnine, you want to be understood that you cannot take as much as of strychnine?

A. I mean thyroid is a more dangerous drug than strychnine because it destroys the tissues of the body when strychnine does not.

Q. What does strychnine do when taken in too large quantities?

A. That depends. What do you mean by "too large quantities"?

Q. The same size dose as thyroid, for instance. Suppose you gave your patient fifteen grains of strychnine.

A. It would kill him.

Q. There is no question about it?

A. No, there is no question about that.

Q. So in that case at least strychnine would be more powerful, would it not?

A. In that sense, yes.

Q. You do not want to be understood that you can take as much strychnine as you can thyroid without killing you, do you, Doctor?

A. No, I do not want to put it that way. I mean to say thyroids are more powerful than strychnine in the destruction of tissues.

Q. Strychnine does not do that at all, does it?

A. It increases the metabolism, yes, just the same as the sun increases the metabolism, or X-ray or exercises increase metabolism. To that extent, yes.

Q. So thyroid increases metabolism the same as sunshine and exercise?

A. Yes.

Q. Doctor, can you tell us how much thyroxin there is in one gram of desiccated thyroid?

A. No, I do not know exactly. There is a standard in the pharmacopoeia as to the iodine content in thyroids. I do not recall it, but it is about two-tenths—I will not try to give it because I do not recall it. Of course, you must remember that thyroxin is not the only active agent in thyroid. The amount of thyroxin actually separated from thyroid is very small. I think Kendall used a number of tons of thyroid to extract the material that he got off finally determining the nature of the product—Kendall or the Mayo Clinic.

Q. Although you do not know the exact amount, you do know the amount of thyroxin is very small?

A. Small, yes.

Q. In desiccated thyroid?

A. Yes.

Q. You would not undertake to say how much was in one Marmola tablet?

A. No, I could not say that.

Q. You classified obesity roughly into two classes, endogenous and exogenous?

A. Yes.

Q. I believe you estimated that 95 per cent of the obese people in this earth were of the exogenous type?

A. Yes.

Q. Is that right?

A. Yes.

Q. And five per cent, it necessarily follows, fall into the class of endogenous?

A. Yes.

Q. You stated that you thought physicians would prescribe thyroid to both classes of people in some instances?

A. Yes.

Q. Both exogenous and endogenous?

A. Yes.

Q. And it would be effective in some instances in both classes?

A. It may be, yes, sir.

Q. I believe you said that if the endogenous obesity was due to the pituitary gland, you thought thyroid medication was useful?

A. Yes.

Q. Is that right?

A. Yes.

Q. You still think that is correct?

A. Yes, particularly if you let them eat all they want to.

Q. I suppose if a person ate enough and was quite enough, it would be absolutely impossible for him to lose any weight under anybody's supervision?

A. I can take the weight off of anybody and let them lie in bed. In fact, I will put them to bed.

Q. Let people lie in bed and eat all they want?

A. All they will eat, absolutely.

Q. All they want to eat of anything they want to eat?

A. Yes.

Q. And then you can take weight off of them?

A. Yes, sir, absolutely.

Q. How do you do that? What medication do you give them?

A. Would you like to try it?

Q. What medication do you give them?

A. I would put them to bed and physic them as much as I wanted to, and I could take the weight off. I would give them all they wanted to eat, because they would not want to eat; they would be too sick. That is exactly what happens in these treatments.

Q. The net result would be that they would be on a reduction diet because they did not want food?

A. Absolutely. If you have typhoid fever, you put them on a reduction diet.

Q. If you give thyroid to a person suffering from pituitary obesity, does not the thyroid medication tend to stimulate the pituitary gland?

A. No.

Q. It does not?

A. That is a fallacy. There may be some interrelation between the glands, and there is, but there is no evidence whatever of the different character that shows that they thyroid simulates the pituitary. In fact, if it did, it would increase the fatness, because fatness due to the pituitary gland is due to the fact that it acts more vigorously.

Q. If there is fatness due to pituitary obesity then there must be hyper-pituitarism. Is that the way to say it?

A. Yes.

Q. Is that true?

A. Yes, hypo-pituitarism. I think I made an error.

Q. I think you did too.

A. Yes, I will be frank to say it. The thyroid and pituitary act along the same line to increase. The thyroid increases. The pituitary also causes fatness by increasing.

Q. What do you mean by "increasing"?

A. Throwing a larger amount of the particular fluid which the pituitary produces, into the stream.

Q. Do you mean to say that pituitary obesity is caused by the pituitary organ throwing too much of its own secretion into the blood stream?

A. That is my recollection. I do not remember the details on that point. I did read it up just this morning, but I have forgotten it.

Q. That is your idea of the pituitary obesity now, is it, that it is occasioned by over-functioning of the pituitary gland?

A. No; under-functioning of the pituitary gland. Underfunctioning of the pituitary gland causes increased fatness in children particularly.

Q. I am talking about an adult for the moment.

A. The same thing holds true.

Q. We have an adult suffering from pituitary obesity.

A. Yes.

Q. Is his pituitary gland under-functioning or over-functioning?

A. Under-functioning.

Q. The anterior or posterior part?

A. The posterior part.

Q. So that if you stimulate the pituitary gland so that it increases its functioning, will you not tend to reduce the person?

A. Not if you give them all they want to eat.

Q. Assume other factors remain constant, that he does not eat any more and continues the same amount of exercise that he did before medication, would he not tend to reduce?

A. Theoretically there is something to that, but practically you get nothing.

Q. Theoretically there is something to it? Do you mean to say the literature you have read makes that statement?

A. That is the conclusion I have drawn from reading the literature, yes.

Q. You say practically there is nothing to it?

A. Yes.

Q. You base that upon your own experience?

A. Yes.

Q. Is that true?

A. Yes. And the experience of medical men with whom I have come in contact and my reading of literature.

Q. Did you ever administer pituitary?

A. No. I do not think it is worth anything.

Q. You do not think it is worth anything?

A. No.

Q. You do not think it is worth anything for any purpose?

A. No, I do not think it is worth anything when it is administered by the mouth.

Q. Do you think it is worth anything when administered hypodermically?

A. Yes, sir.

Q. For what purpose?

A. I cases of labor, the terminal end of labor, in order to put more tone into the uterus and control hemorrhage.

Q. Do you not think pituitary is of any value unless given hypodermically?

A. I do not think so.

Q. But you think thyroid is of benefit when given by the mouth?

A. Yes, sir.

Q. You do not think the giving of thyroid medication tends to stimulate the other endrocine glands?

A. I did not say that.

Q. You did not say that?

A. No.

Q. You said you did not think it tended to stimulate the pituitary glands?

A. Yes.

Q. So you differentiate between the pituitary and one of the other ductless glands, do you?

A. We know there is a big difference. We know there is an interrelation, particularly between the thyroid and the ovaries.

Q. But you do not subscribe to the statement that there is an interrelation between the pituitary and the thyroid?

A. I did not say that.

Q. You did say just that—though perhaps I went too far. You did say there was not sufficient interrelation

so the giving of thyroid would tend to stimulate the pituitary gland?

A. To get any results, yes.

Q. You said there was another type of obesity due to the suprarenal glands?

A. Yes, the little glands above the kidneys.

Q. Do you think the giving of thyroid tends to stimulate the suprarenal glands?

A. Yes. There is some interrelation there.

Q. There is some interrelation there?

A. Yes.

Q. So that thyroid medication would have some effect on that type of obesity?

A. No.

Q. Is that type of obesity due to the over-functioning or under-functioning of the glands?

A. Over-functioning of the glands. It increases the amount of material thrown into the stream which contracts the blood vessels and curtails the supply of blood to the tissues, delays and retard oxidation, and acts the same way as in the case of anemia, improper oxidation.

Q. Would not thyroid medication increase oxidation?

A. Yes, but by the thyroid stimulating the glands above the kidneys, you increase the contraction of the blood vessels and, therefore, if it does anything it increases obesity, if anything.

Q. Is this a frquent type of obesity?

A. No. We have few. Napoleon was one of the characteristic ones of that type.

Q. Did you ever treat one?

A. Yes.

Q. What did you give the patient?

A. The only thing you can give them in diet.

Q. What did you give them?

A. Diet—proper diet and exercise.

Q. You said that many people could not exercise?

A. Yes, that is true.

Q. This one that had this peculiar type of obesity could, then, I take it?

A. Which one?

Q. You said you treated just such a one as we talked about with diet and exercise.

A. Yes.

Q. How old was that patient?

A. I do not recall the age.

Q. How much did the patient weigh?

A. That patient weighed over two hundred pounds.

Q. Was the patient a man or woman?

A. Woman.

Q. Young or middle-aged or old?

A. Average age—forty—thirty-five or forty; I do not remember exactly.

Q. Did you reduce her?

A. Yes. I will reduce any patient if they will do what I tell them, without diet—without drugs.

Q. Without diet and without drugs?

A No, I did not mean to say "without diet." Without drugs.

Q. Your statement was, as I have it in my notes, "Many people could not exercise, but few could not diet."

A. Yes, that is right.

Q. I believe you said that people over fifty-five ought not to take any exercise, or a statement something to that effect.

A. Yes, without supervision.

Q. Without medical supervision?

A. Yes; or gymnasium supervision.

Q. What do you mean by "gymnasium supervision"?

A. A person taking gymnastic exercises ought not to take those exercises without medical supervision if they are over fifty-five.

Q. Then medical supervision and gymnasium supervision come down to the same thing, do they?

A. Not necessarily.

Q. I understand what you mean by medical supervision. You mean supervision by a doctor. But I do not understand what you mean when you say "gymnasium supervision."

A. A gymnasium usually is under the supervision of a medical man when you are reducing weight.

Q. When it goes down to the same thing, that you ought not to undertake exercise if you are over fifty-five, without medical supervision?

A. That may be true, but usually you have to detail some of this work to a gymnasium instructor. You cannot stand there and do all that work yourself.

Q. So your idea is it ought to be under the supervision of a medical man or somebody who has been detailed by a medical man to do it?

A. Sure.

Q. Is that right?

A. Sure.

Q. So if a man is over fifty-five he ought not to take on any exercises except under those conditions?

A. As a general rule, yes.

Q. I think you said it would be an absolute miscarriage of justice, or something of that sort, for anybody over fifty-five to do that thing.

A. Without supervision, yes, and I say so yet.

Q. You say "anybody" there. Do you mean that nobody should undertake exercise after fifty-five years of age without medical supervision?

A. The ordinary exercises that are given in a gymnasium, yes. That is all we are talking about.

Q. Are you limiting this to gymnasium exercises?

A. Those are the exercises usually used for the purposes of reducing weight, yes, physical exercises.

Q. Suppose you have a certain number of weight machines over against the wall where a man can go and start exercising his abdominal muscles by pulling up the weights.

A. I do not think it is worth much.

Q. You do not?

A. No.

Q. Suppose you have a track in the gymnasium where a man can start jogging around.

A. I do not think the exercise by way of walking amounts to much by way of reducing fat.

Q. He increases his oxygen intake?

A. He may and he may not.

Q. As a general thing, if you walk briskly you increase your oxygen intake?

A. If you walk briskly. When you have to walk about three or four miles to reduce, to burn up four ounces of fat, you are not getting very far by a little exercise of that type.

Q. Do you mean to say it is not quite as effective as some other, but it is still effective?

A. Ordinary walking?

Q. Yes.

A. Ordinary walking is not of value in reducing weight. It simply tones up the muscles.

Q. That is of some value?

A. Sure, but it does not necessarily reduce weight.

Q. You said something to the effect that we should not give thyroid to anybody suffering from kidney disease?

A. Yes.

Q. Is that right?

A. Yes.

Q. In other words, if any person is suffering from any form of kidney disease, he ought not take thyroid?

A. Any form of kidney disease?

Q. Yes.

A. Yes.

Q. And your reason for saying that was that thyroid increases the flow of urine?

A. That is one thing, yes.

Q. And a further reason was that in your judgment thyroid tends to waste away or take away the kidneys?

A. Break down the tissues.

Q. The kidney tissues?

A. Both the kidney tissue and the protein tissue—well, the kidney tissue is protein—no, I do not mean that. Your kidney tissue is a protein tissue. It acts the same on all muscular tissue, whether it is ordinary protein type of whatever type you have.

Q. As a matter of fact it starts to act on the sugar content first, does it not—excess sugar?

A. I do not know what you mean by "act on the sugar." Sugar is the first food element that is burned up in the body. That does not mean that thyroid acts on sugar.

Q. I do not mean to say that it does. I mean thyroid medication tends to burn up the sugar first, does it not?

A. It increases oxidation of the sugar.

Q. Sugar is the first thing that burns?

A. Sugar is the first food substance that is burned up in the body. It is most readily oxidized outside of alcohol.

Q. And the fat is the next thing?

A. Yes.

Q. You said you should not give thyroid to a person who is naturally toxic.

A. Yes.

Q. What do you mean by "a person naturally toxic"?

A. That is rather a broad question. Take a person that is absorbing what we call toxines through the large bowel because of constipation, and the thyroid would be of no value in such a case.

Q. It would be of no value?

A. No. The thyroid does not oxidize that particular substance.

Q. Marmola would tend to ameliorate that condition, would it not?

A. Through the laxative, yes. That is another story, however.

Q. Then the thyroid would be of some value, would it not?

A. Not for that toxic condition.

Q. But assuming the patient was obese?

A. We are talking about toxic conditions just now.

Q. Assume he is obese and you say he is naturally toxic from poisons in the large colon and we give him Marmola, that would tend to relieve the toxic conditions through absorption in the colon by the laxatives in Marmola, would it not?

A. That is true, but that has nothing to do with thyroid.

Q. And unless you have that condition in some way ameliorated, the thyroid will tend to reduce him, will it not?

A. In some cases the thyroid may be of service in effecting oxidation, but not so far as the toxic state is concerned.

Q. I understand that they do not give thyroid to relieve toxicity. Is that all you meant to say when you said that thyroid should not be given to naturally toxic people?

A. I meant to say just what I said. I would not give thyroids to a toxic patient of any kind. I think they have all the toxin in them that they need, and you simply add more to it.

Q. Suppose that person has symptoms of hypothyroidism, do you still say you would not give it to him?

A. Yes, I would still say so.

Q. You would say that because he has symptoms of toxicity, that even though he had also definite symptoms of hypothyroidism, still you would not give him thyroid?

A. Yes. That might be a very serious matter in that case.

Q. What do you mean by "serious?"

A. You have already got a toxic condition and by the using of another toxic substance, you increase the toxicity of the patient.

Q. If you had such a pitient as that, you might better give him a Marmola prescription that has some laxative in it?

A. That depends entirely on what your toxic subject is. If your toxin was due to pulling over of diptheria or pneumonia or typhoid fever, no.

Q. Would you believe those people naturally toxic?

A. Yes, they are absolutely toxic.

Q. Would they be obese?

A. They may be.

Q. Are they apt to be?

A. Not necessarily, no.

Q. You told us something about thyroid medication and patients suffering from myxedema.

A. Yes.

Q. I believe you stated a person suffering from the disease known as myxedema—that the dosage recommended by the Raladam Company for Marmola would not be sufficient. Is that right?

A. Small dosage, yes; that if we have a marked clear case of myxedema, yes.

Q. A marked clear case of myxedema ought to be given larger doses of thyroid than given by the directions accompanying Marmola?

A. On the average, yes.

Q. What would be the result of giving the dosage recommended in the pamphlet accompanying Marmola, namely, four times a day?

A. In myxedema?

Q. Yes, in myxedema.

A. There might be some improvement.

Q. There might be some improvement?

A. Yes, and you might have a mild case where it would be very immaterial.

Q. People suffering from myxedema are fat or obese?

A. They are pudby and thick. Most of them are obese, yes.

Q. The giving of two grains a day of thyroid would tend to reduce that obesity, would it not?

A. There might be some reduction there, yes, to make the patient feel better; not necessarily reduce the weight to make the patient reduce, but to make the patient pick up and act more in the nature of a tonic and increase the oxidation of the tissues and clear up the stupidity to a certain extent.

Q. There would tend to be some weight reduction as well?

A. Probably in a case of that character, yes.

Q. You said, Doctor, that the administering of thyroid might be harmful to some nervous patients. That is the way I have it in my notes, and I think that is what you said?

A. Yes, sir.

Q. What type of nervousness do you have reference to?

A. Most any kind of nervousness except possibly that due to lack of supply of vitimines.

Q. What type is that? First, the name of it.

A. Polyneuritis; that is the general name for it.

Q. That type of nervousness do you think would be aggravated or accentuated by—

A. (Interrupting) I would not say positively. I do not know how it would affect that type of nervousness.

Q. Have you made any special study of nervous diseases?

Q. You would not want to attempt to qualify as a nervous expert?

A. No, sir, I do not. My knowledge is just general.

Q. Do you find very many obese people that are nervous?

A. Yes, decidedly so; most of them are nervous about their fat.

Q. By "nervous" do you mean apprehensive?

A. Nervous.

Q. What symptoms do they exhibit?

A. They are anxious and desirous of getting rid of some of their fat, and they try to do it by diet; and they have too big an appetite, and they get nervous and do not get results and they get disturbed about it.

Q. What symptoms of nervousness do they exhibit beyond their anxiety and apprehensiveness over their excess flesh?

A. Don't you think that is symptom enough?

Q. I am just wondering if that was the only symptom?

A. There are plenty of symptoms there.

Q. I do not disagree with you, I think. I am just trying to find out what there is in the way of other symptoms that you have observed in obese people.

A. They are generally nervous and anxious. There are some of them that have absolute tremors, and have an increase of heart action. Their fingers even tremble in some cases.

Q. You said the giving of thyroid would accentuate their nervousness. Do you think it would accentuate their apprehension about their fleshy condition or over-anxiety?

A. It probably would, yes. Anything that would make for more nervousness would do that, sure.

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Q. Would their nervousness be increased if they dieted and exercised?

A. Diet might add to it, yes. Some of them get nervous because of the diet they are subjected to at times, yes.

Q. Some of them get nervous about the diet and some of them get nervous under exercise, do they not?

A. I do not know about exercise. I was speaking about diet. If they overdo their exercises, yes, they will have some nervous condition.

Q. They will get tremors?

A. No, I do not think they would get tremors, but they would get nervous—not necessarily tremors.

Q. I said tremors because I thought that had been my experience. If I run real rapidly I experience tremors.

A. Your heart action is increased, and if you carry it too far you would have your nerves wrought up for the time being. Some of the athletes even lose consciousness. That, however, is mostly due to another fact than nervousness.

Q. You spoke about some tuberculosis patient being overweight—I do not know whether you said obese—and exhibiting symptoms of hypo-thyroidism. Did I understand you correctly?

A. That is correct, yes.

Q. There are such instances?

A. Yes, cases of tuberculosis you will find everywhere. They may be in fat people and they may be in lean people. There are probably as many people have incipient tuberculosis who are fat as those who have the advanced condition that are lean. It is a very common thing for fat people to have tuberculosis of the incipient type. That is the way they usually begin, at least after they reach adult life. One of our very powerful men in the Department of Agriculture is a very large man and obese, and yet he had a marked case of tuberculosis.

Q. That is very common in your experience?

A. I would not say it is very common, but it is very natural. Yes, it is common, sure it is. Go into some of the tuberculosis sanitariums and look people over, and you will find fat ones there and you will wonder why in the world they are there. They are incipient types of tuberculosis. I am not talking about the advanced cases.

Q. They lose usually, then, do they not?

A. Yes, they usually do. Of course if it is of the hemorrhagic type; not necessarily.

Mr. Gust: That is all.
(Witness excused.)

DR. WILLIAM EARL CLARK was called as a witness on behalf of the Commission, and having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Hornibrook.

Q. Will you give your name to the Examiner?
A. William Earl Clark.
Q. What is your occupation?
A. Physician.
Q. Where do you practice?
A. In Washington.
Q. How old are you?
A. I am 48, almost 49. I will be 49 in a few days.
Q. Of what school are you a graduate of medicine?
A. George Washington.
Q. When did you graduate?
A. I graduated in 1904.
Q. Have you been practicing in Washington continuously ever since?
A. No. When I graduated I went to Pennsylvania Hospital and served. First I served at resident in Garfield Hospital here, 1903 and 1904. Then I went to Pennsylvania Hospital and served during 1905 and 1906.
Q. As Interne?
A. As an interne.
Q. Have you studied abroad?
A. I was abroad during the war where of course we had monthly conferences in Paris. They were medical meetings and were like a post-graduate course in a measure.
Q. Have you taken other post-graduate work?
A. I had post-graduate work in New York at the Post-graduate Hospital.
Q. Are you connected with any school of medicine here?
A. I am an assistant professor at Georgetown Medical School.
Q. Are you connected with any sanitarium?
A. We have four little sanitariums. We call them nursing homes.

Q. When you speak of "we" who do you mean?

A. I head the firm. Then there is Dr. King and Dr. Perry, and now we have taken another new man named Geier. We practice in the group. We are all doing diagnostic and nutritional work.

Q. Do you specialize in any particular branch of medicine?

A. I am known in town mostly as a gastronologist. Although we are doing general work, our specialty is as gastronologists.

Q. Is your practice extensive?

A. Yes, it is.

Q. Are you familiar with a drug known as desiccated thyroid?

A. Yes.

Q. Have you used it in your practice?

A. Somewhat.

Q. Do you know its effect on the human body?

A. Yes.

Q. Is it considered a powerful drug?

A. It is considered what we call a sharp-edged tool, a drug that varies tremendously in its action on different people, and we never give it unless close observation.

Q. Is it a drug that can be safely taken without first a careful examination by a skilled physician and then followed up by subsequent examinations?

A. I would say no, it is not safe.

Q. What would you say of a dose of desiccated thyroid amounting to two grains a day, given in four doses of half a grain to the dose, one time after each meal and then before going to bed, for a period of for sixty to ninety days? Is there danger to the patient in taking that does for that period of time?

A. I would think very definitely that in a large group of cases there would be bad results from giving that size dose over that period of time.

Q. What might those results be, Doctor? What might that does for that period of time result in?

A. With a certain percentage of patients it would be apt to throw them into a position akin to hyper thyroidism.

Q. By that you mean what?

A. Rapid pulse, headache, nervousness, tremon, often bad diarrhea, weight loss, sweating and often a toxic state. I have seen them where they even became a little

irrational. I think it would be possible for the same thing to happen if a patient is susceptible to the drug.

Q. In addition to that might it so undermine the system as to make the patient subject to contagious diseases?

A. It would lower the general health level, which would of course make them more susceptible to any infection. Another thing I did not mention is that it would be apt to have an effect on the heart muscle if long continued, just as hyperthyroidism does, and bring about a condition of myocarditis.

Q. How would it affect a patient already suffering from kidney trouble?

A. I think it would be a bad thing, because we know that hyperthyroidism often will bring about changes in the kidney as well as in the heart muscle.

Q. What would you say about its effect upon a woman undergoing the change of life?

A. At that time in a woman's life her glandular balance is very much upset anyway, and I would feel that that would be a time in her life when one would have to be most cautious in the use of any glandular drug.

Q. Does your practice bring you in contact with obese patients, people seeking to reduce their flesh?

A. Yes, a great many.

Q. There are several kinds of obesity, are there not?

A. Yes.

Q. Can you name some of them?

A. The most common variety seems to run in females of a heavy build with a tendency to take on weight. I think usually they are pretty hearty eaters, and most of them bread and butter eaters. Most always they do not like to admit that they eat it, or if they do they will say, "Mrs. So-and-so is slim, and she eats more than I do." They are fond of candy and sweet desserts. They will diet for a day or two and then go back to a full meal the next day. That is the most common kind. I looked up the record this morning, thinking it might be asked. I went over our records of obesity. I did not have time to compute it absolutely, but as nearly as I can tell roughly, only two or three per cent of our cases of obesity showed a hypothyroidism in the metabolism tests, although most hypothyroids are obese. They are not all obese who are hypothyroids. From our observation it is a small percentage.

Q. Take the case of a person just naturally fat and the thyroid glands are not affected at all. Is the ad-

ministering of thyroid remedy in a case of that kind proper practice?

A. If by diet and exercise, reduction of water and every other known method, that patient cannot be made to lose weight, we sometimes use thyroid, but under very strict observation. I caution them beforehand and tell them that they must report in for pulse determinations and for observations at frequent intervals. I usually start with a small dose like one-tenth and feel the way up very gradually.

Q. How often do you examine them during this treatment?

A. We would examine them at least three times a week the first week until we feel out the effects of the drug. We consider it a sharp-edged tool and a very dangerous drug if given to a patient and leaving it to their judgment and leaving them to continue with it.

Q. You would not think of giving them two grains at the start then?

A. Never.

Q. No matter what their condition was?

A. Never. I never have.

Q. Examine Commission's Exhibit No. 4 now before you. I will ask you to state how many kinds of physics or laxatives you find there.

A. Cascara sagrada, phenolphthalein, and the liquid petroleum of course are laxatives.

Q. Assuming that a tablet made from that formula were given four times a day for a period of sixty to ninety days, would that or not tend to create a laxative habit in the person taking them?

A. You are touching me on a tender subject. I am very much averse to the use of laxatives. We went over our record at one time and were convinced that laxatives brought more patients to us than any other one cause. I think it is one of the worst habits the members of the human race are subject to. It is not only the danger of producing the laxative habit, but I have repeatedly examined the colon of patients who were chronic laxative takers, and instead of it being a nice healthy pink color, like the inside of your mouth or a normal mucus membrane, it is usually very red. There is the difference between an ordinary skin and a sunburned skin. It shows a definite reddening and usually it is drier. Almost always there is a little mucilagious mucus present, so the more they take the more they have to take, because gradually the bowel gets sticky and dry,

and the feces become hard and dry, and they have to take increasing quantities of laxatives to secure a bowel movement.

Q. Might the taking of this compound, the formula for which is given in Commission's Exhibit No. 4, for a period of sixty to ninety days thus bring about such a condition as you have described?

A. I think in a large percentage of patients it would. There is a certain group of people that apparently can take a gentle laxative pill—gentle, I say—maybe two or three times a week with apparently no ill effects; but there is a large percentage and the main percentage I think that would have organic structural changes take place in the bowel as a result.

Q. Are you familiar with a laxative called dilaxin?

A. I am not.

Q. Assuming that it is a laxative of the same strength and operates the same as one of the major laxatives there as shown in Commission's Exhibit No. 4, the same type and character as cascara sagrada—assuming that it was recommended that that laxative be taken in conjunction with the two named and those recommendations were followed by a patient for a period of sixty to ninety days, would that tend to aggravate and make more serious such a condition as you have described in your answer to the previous question?

A. I would feel that it would.

Q. Would the taking of Marmola, assuming that that is the formula you have before you in Commission's Exhibit No. 4, for a period of sixty to ninety days affect the urine?

A. I think if the patient had any nephritis, it would probably agitate it. Whether it would produce albumem or signs of irritation in the kidney would depend altogether on the individual. But I think, as I said, that hypothyroidism tends certainly to produce kidney changes and we know that large doses of thyroids will throw them into a state of hypothyroidism. I think you could feel fairly sure that a certain number of cases would have kidney changes take place.

Q. Would it affect the heart?

A. I think I answered that a while ago, that it would be very apt to.

Q. Do you know of any cases where uncontrolled use of thyroid has resulted in poisoning?

A. I do.

Q. Toxic or otherwise?

A. We had one nurse at the hospital that considered she was too stout and started taking thyroid, and I do not think even as much as two grains a day. It may have been about two grains a day. Perhaps half a grain, which is a frequent dose, is what she took. She was thrown into a state of hyperthyroidism and it really brought on a definite swelling of the thyroid gland and all the accompanying symptoms. She had to be put in ice and in complete rest, and so forth, to be gotten in condition for operation, and was finally operated on. That history has been repeated many times.

Q. How long was she affected?

A. You mean before she was operated on?

Q. How long was she affected by this over-discharge of thyroid?

A. It was several weeks, four or five weeks before they could operate, because she was very toxic and very ill.

Q. Were there any permanent results that you know of?

A. I think they were able to get her thyroid glands out in time so there were no permanent effects, but there are many cases in the literature of similar happenings where they had to take out the thyroid. The whole medical profession is really—at least I think all the more competent men who stand well in their profession are very timid about the use of thyroid.

Q. Is it given by the medical profession for obesity?

A. Yes. I think the way we use it—If all other methods fail and if the patient is so much overweight as to constitute a detriment in her health, if she is made inefficient by her overweight and if by diet and exercise and water control that patient's weight cannot be reduced materially, it is perfectly good practice to cautiously start in with thyroid medication. But we would never do it, as I said, unless it was carefully controlled. I do not think we use thyroid in more than maybe one out of twenty cases of obesity.

Q. And never without this care?

A. And never without very careful checking.

Q. And never in cases where diet and exercise will suffice?

A. Oh, no. Of course every patient would rather not have to bother with exercise and diet. Like the fellow who would like to get rich quick, they would rather take a tablet.

Q. Will thyroid build up muscle and at the same time destroy fat?

A. I do not see quite how it could. Thyroid of course increased oxidation and burning, in which I think all the cells of the body would share.

Q. In your experience how small a dose would cause nervousness in some patients

A. I have seen some patients, before we get up to more than one-fifth of a grain, get so nervous we would have to stop it by the third or fourth day.

Q. And in other patients you find that they can take quantities?

A. They can tolerate quite large doses.

Q. So it is not a drug you can prescribe for all people in equal quantities?

A. No. I do not know of any drug that varies more in its effects on the patients.

Q. I wish to ask you a few hypothetical questions now, Doctor. I may be going over some of the ground already covered. Assuming that Commission's Exhibit No. 4, is a true statement of the contents of Marmola, and Marmola is given, four tablets a day or two grains a day—that is, half a grain after each meal and half a grain before retiring—I will ask you to state whether or no that preparation is the result of and is based upon scientific research, knowledge and accuracy?

A. I do not believe I quite understand you.

Q. I will withdraw the question. Examine Commission's Exhibit No. 4 and state whether or not that preparation is based upon scientific research, knowledge and accuracy?

A. I would say it was not.

Q. I wish you would bear in mind that formula all the time during these questions. I will ask you to state whether or not in your opinion its medical properties are safe, pleasant and effective in their action in the removal of excess flesh from the human body?

A. Again I would say no.

Q. I will ask you to state whether or not in your opinion the same may be used by purchasers thereof without discomfort, inconvenience, or damage of harmful results to the physical health of such users?

A. I would say that a very large percentage of patients using the unobserved and uncontrolled would result in damage to their health.

Q. I will ask you to state whether the giving of

Marmola is a scientific method for the treatment of obesity?

A. I would say it is not.

Q. I will ask you whether the formula given in the dosage as set forth in Commission's Exhibit No. 4 will act with a reasonable degree of uniformity upon the bodies of all users thereof?

A. No.

Q. I will ask you whether it will be efficiency and would be generally effective for the reduction of excess flesh of the users thereof without impairing the health of a substantial portion of such users?

A. It would not.

Q. I will ask you to state whether or not it may be safely used by any individual purchaser thereof without previous consultation with a medical adviser?

A. I would say it would not.

Q. Is not thyroid, when introduced into the human body, a powerful agent, liable at all times to produce radical changes in conditions that will be harmful to the users thereof?

A. Yes.

Q. Is this not true, that such harmful changes may safely be guarded against in any case only by the previous and continuing investigation, observation and advice of a competent physician?

A. Yes.

Q. Is it not true that the use of thyroids for the reduction of excess flesh even under the direction of a competent physician is fraught with possible injury and calls for constant professional observation, medical skill and care?

A. Yes.

Q. What do you think of these directions as applied to Marmola? "This treatment should be faithfully taken as directed for sixty to ninety days"?

A. It would seem to be very unscientific and dangerous.

Q. "Stop when you are satisfied. Then if you start to gain again, take Marmola a while longer."

A. My answer is the same as to the other question.

Q. "Try not to miss a dose, for the cumulative effects are important." Is that a dangerous direction or not?

A. Yes, it is.

Q. Is there any rule that applies to all persons as to the number of pounds per day which can be safely re-

moved from a patient in a process of treatment for reduction?

A. Roughly, three pounds a week on the average patient is what we try to secure. We do not like them to gain any faster than three pounds a week and we do not like them to lose any faster than three pounds a week.

Q. Is not there a difference in different anatomies? With one person it might be safe to reduce a pound a day while with another person it would not be safe to reduce more than half a pound.

A. Yes, that is true. There are some patients we find even with our diet and exercise that if we get the diet down too strictly, although they may have been losing weight very rapidly, they will begin to feel weak and badly and we will have to increase the diet and go a little bit more cautiously with them. I think with a patient being reduced anyway, it is always a good plan to have them under medical supervision.

Q. Then you would say that directions that the patient may reduce safely a pound a day applied to all people is—

A. (Interrupting) It is too much.

Q. You would say it is too much?

A. Yes.

Q. Is the use of Marmola under the directions which I have heretofore indicated the best fitted remedy to suit the average case of obesity?

A. I would not say so.

Q. Is the use of Marmola alone in cases of obesity a scientific remedy?

A. No.

Mr. Hornibrook: You may take the witness.

Cross-examination by Mr. Gust.

Q. Doctor, how long have you been using thyroid in your private practice?

A. I would say fifteen years in all probability. I cannot tell exactly. That is as near as I can come, and I think that is close enough.

Q. Whose brand of thyroid are you using now?

A. I use Armour's because we can get it fresh.

Q. Is this (indicating) the thing that you use? I am referring to Respondent's Exhibit No. 1.

A. Yes. We do not use it in that dose.

Q. Is that the size of tablet?

A. We usually, as I said when I was questioned be-

fore, start in with one-tenth of a grain and then go to one-fifth of a grain and feel our way along with it.

Q. What I am trying to get at is this: You use desiccated thyroid?

A. Yes.

Q. Prepared by Armour & Company?

A. Yes.

Q. Do they put out one-tenth grain tablets?

A. No, I suppose the drug stores crush them up and mix them up. I simply order one-tenth grain thyroid and they put it in little capsules. I suppose they crush up the tablets with a mortar and pestle and make up in the smaller doses.

Q. You say you have never given as much as two grains a day for obesity?

A. I have never started them in at that dosage.

Q. How large doses have you ever given?

A. I do not think I have ever gone over three grains a day. I think I have gone as high as three grains a day, but very rarely. I very rarely have gone as high as two, as a matter of fact.

Q. Your system of reduction is diet and exercise in the first instance?

A. Yes, diet and exercise and control of water drinking, because there are a great many people fat as a result of very heavy intake of water.

Q. Do you not include that in the term "diet"?

A. Yes.

Q. You control the intake of both food and water?

A. Yes.

Q. And you prescribe exercise?

A. Yes.

Q. You treat obesity in that manner?

A. Also massage, and especially the vibratory massage, which tends to help reduce parts locally, especially if there are local collection of fat.

Q. You are averse to giving any medication unless those methods fail?

A. Yes.

Q. But they do fail in some instances?

A. Yes.

Q. When they fail you undertake thyroid medication?

A. Yes, but I always, before I ever give thyroid, tell the patient it is a sharp-edged tool and it is possible they might have some uncomfortable sensations and may have even a slight illness, so they know exactly what we are

doing and I get their consent before going into that scheme.

Q. Do you tell them they may also have an unpleasant sensation from your exercise and diet?

A. I do not know whether I do. I think they know that perfectly well.

Q. But they do experience that, so you tell us, under your diet at times?

A. Sometimes, yes.

Q. They are quite aware of those symptoms whenever they experience them?

A. I usually do tell them it is going to be a hard fight and that it is going to be uncomfortable and trying. I usually try to be perfectly frank in giving the picture as well as I can so far as describing any specially untoward symptoms. I do not expect them, although now and then we get them.

Q. You may expect in some instances unpleasant symptoms no matter what method of reduction the patients are given? Is that right?

A. No, I do not expect anything except a trying of their courage and morals and sticktoitiveness. It is so rare that we have any real uncomfortable symptoms from diets—I do not think it is more than one per cent or two per cent that we would expect any really unpleasant symptoms from diet or exercise.

Q. Do you give any other drugs than thyroid for obesity?

A. In reduction, no.

Q. Thyroid is the only drug you use?

A. Thyroid is the only drug we use, yes, for obesity. Now and then in a woman, for instance, if she has had her ovaries removed, even that upsets the gland balance, and sometimes such a patient we would give some ovarian substitute.

Q. You would not give them that especially for the obesity but to correct the lack of ovarian substances?

A. Yes.

Q. I think we understand that thyroid is the only drug which you give for obesity?

A. The only drug used. There may be others who use others.

Q. I mean you.

A. Yes.

Q. That reduces the obese patient by increasing his metabolic rate?

A. Yes.

Q. That is the chief action of the thyroid, is it, to increase the metabolic rate?

A. When you get on the subject of the ductless glands you are on a subject that is still in the process of being worked out. That is one of the chief functions of the thyroid gland, to give off a substance that increases the activity, but it probably gives off other substances that are related to the other ductless glands, like the pituitary, the ovaries, the testicles, the adenals, and so forth.

Q. So when we get into this subject we are not sure just exactly what it does do?

A. No, we are sure.

Q. Of one thing, but what else?

A. We know that all the glandular system is interrelated and we are so afraid of upsetting the balance, which is most necessary to the human being. If it was just a straight matter simply like increasing the metabolic rate, it could be used more safely, but the danger of upsetting the whole endrocine system is the reason why the medical profession generally are timid about its use.

Q. I want to get just what you meant when you said "When we get into this field of the endrocine gland system, we are in a subject that is in a state of flux," or some such expression.

A. Yes. We probably know more about the thyroid gland than we do any other. We are beginning to know more about the pituitary and more about the internal secretion of the ovary and more about the internal secretion of the adrenal. We know they are all interrelated, but I think there is still going to be a great deal of work done and evidence accumulated before the whole picture is thoroughly understood.

Q. Is it your experience that the giving of thyroid tends to stimulate the pituitary?

A. I think I would not say especially that it did. Often the pituitary and headache go hand in hand, and it may be that headache, frequently accompanying hyperthyroidism is due to some kind of pituitary.

Q. Have you found the giving of thyroid medication a benefit in the case of hypopetuitarism?

A. No, I cannot say that I have.

Q. Have you had any experience with that one way or the other?

A. Not that I can recall right now. We have had a

number of cases of hypo-pituitarism. We have simply used the pituitary substance for the direct action.

Q. Through the mouth or hypodermically?

A. Through the mouth.

Q. Did you have any results from it that way?

A. I think I can answer yes to that.

Q. You think it is of value given in that manner for hypopituitarism?

A. I remember one little boy that we considered, from his general makeup, was a hypo-pituitary case, and he seemed to develop better and tone up. His soft tissues seemed to get a little more firm. I worked with Dr. Lewis at the Government Hospital, who has had a good deal more experience with pituitary than I have, and we worked together with him and we were pretty well convinced that we got some benefit from it.

Q. How much thyroid do you think you have prescribed altogether in your practice?

A. As I said a while ago, I do not believe we use thyroid in more than two per cent or three per cent of our cases.

Q. How many patients have you right now that you are giving thyroid?

A. I do not think a single one right now, because I am just back from my vacation, so I have not anybody under observation now.

Q. How many did you have in the period before you left for your vacation?

A. I do not know that I had any right before that, but probably last winter I would say three or four patients, and that would be a fair average.

Q. That would be about your average that you would be giving thyroid to, three or four?

A. Yes.

Q. At any one time?

A. Yes.

Q. You give doses ranging from as low as one-tenth of a grain up in some instances to three grains?

A. Yes. I am not absolutely sure that I have used as much as that. I wish I had had time to go over my records. I intended to do so, but in the rush of things I did not get a chance. There was one patient I do remember we had to run up her thyroid medication to larger doses than I have ever used before.

Q. You never have given more than three grains?

A. Not as far as I can recollect.

Q. Did your three grain patient that you remember have a minus metabolic rate?

A. Oh, yes. I would never think of using thyroid in that dose unless she was definitely hypo.

Q. Do you have any idea how much thyroid is created by the normal human thyroid gland?

A. I have not. I suppose everyone of us present in this room has a different amount of thyroid being given off.

Q. Have you any idea about the average?

A. I have not.

Q. Do you know the amount of thyroxin there is in a grain of desiccated thyroid?

A. I used to know, but I do not believe I remember now.

Q. You have forgotten now?

A. Yes.

Q. Do you know what is the dose stated in the U. S. P. of desiccated thyroid?

A. I think they give the dose as one grain.

Q. How often does that mean?

A. I do not think they say.

Q. That depends on the judgment of the physician?

A. Yes.

Q. That is simply a statement of the single average dose?

A. Yes.

Q. But how many times it should be given a day, they do not say anything about it?

A. No, they do not say anything about that.

Q. When the thyroid increases the basic metabolic rate, it has been stated that the excess sugar in the body is first consumed. Do you agree with that?

A. It is first used in the ordinary activities of the body, yes, as blood sugar.

Q. Is it true that the next thing to be used is the fatty substances—somebody said fatty tissues? Is that correct?

A. It would be all right to call them fatty tissues or substances. That is usually the history in anyone that says you burn up your blood sugar and begin calling on your other tissues and the fatty tissues. That is really one of the normal things about being fat, that you have something in the way of a storehouse that you can use in typhoid fever or pneumonia as a storehouse of energy and food. It would be called on later after you had a special burning of your blood sugar.

Q. After the blood sugar is burned, either by raising the basic metabolic rate, whether by exercise or the administration of thyroid medication, the blood sugar would be the first consumption?

A. I think you would only consume a certain amount of it. Any excess would be stored in the liver.

Q. It would be the excess sugar in the blood that would be first used?

A. Yes.

Q. The next thing to go would be the fatty tissues?

A. Yes.

Q. Because they are more combustible than the other substances? Is that right?

A. Yes.

Q. I assume that the patient feels better if he is definitely obese when that starts to happen, does he not?

A. I think if it was done by exercise or done by diet, yes, and I think in a certain percentage of cases with thyroid medication he would. Early in our talk I think I said if you begin to upset your other glands, though, by the administration of thyroid, instead of feeling better you may feel worse.

Q. Those symptoms would be readily observable so he would feel worse?

A. He would probably after a certain time begin to feel worse. He would begin to have weakness and tremor headache.

Q. If there was no upset then in the endrocine balance he would feel better?

A. I would think he would be apt to feel better.

Q. That would be the normal thing to expect?

A. Yes.

Q. If he did feel worse, if he had these symptoms of headache, nervousness and tremor, it would be because his endrocine balance had been upset?

A. Yes, I think you may explain it that way. I think you would have to consider too the possibility of some toxic effects of the drug itself on that person because, as I said, there are a great many people who are susceptible to thyroid medication—and that is my own idea of one of the contributing things that makes him ill—the upsetting of glandular balance. It may be some toxic effect of the drug itself.

Q. Why do you say it may be some toxic effect of the drug itself? Has that been your experience? I think you said your experience led you to believe it was getting the endrocine system out of balance?

A. I do not think I said that. I said I thought that was one of the possible dangers, that while the medical profession generally feel that the glandular system is interrelated, that we were very timid about starting the use of thyroid, which is the sharpest edged tool of them all.

Q. What do you mean by "of them all"?

A. The glandular substances. That is why I said we thought the glandular balance of the human being was a most important thing to his health and that the fear of upsetting that balance was one of the things that deterred us from using it.

Q. Has it been your experience that the average obese person who is otherwise normal has a normal metabolic rate?

A. Yes, it has been. I think in giving evidence about a half an hour ago I asked Dr. Geier, who is the youngest member of our group, to go over our records, because he does all the metabolism work in our office, and he reported that the proportion of our obese patients that were hypo-thyroid was a small group.

Q. When you say "hypo-thyroids" you mean people with a minus metabolic rate?

A. Yes, and they are the only ones we know are hypo-thyroids.

Q. Those are the only ones you consider are hypothyroids?

A. These are the only ones we consider are hypothyroids.

Q. They have a minus metabolic rate?

A. I would qualify that. If that patient had other symptoms of hypo-thyroidism other than obesity—and I do not consider obesity enough, but if they had dry skin, if they were chilly, if they had coarse and falling hair, if they were sluggish mentally and if they showed those symptoms—because before we ever had metabolism machines we could recognize these hyper or hypothyroidisms and we used our metabolic machines to verify and even to help out in cases that are borderline.

Q. Do you not find some people are hypothyroids suffering from hypothyroidism who have normal metabolism?

A. I cannot recall, certainly in the last few years since we have been having our own machine and following them more closely, because we feel we can do it without expense to the patient—I cannot recall an obese patient that I considered had hypothyroidism that did not

have a minus test. There are a great many of them that I have been of the opinion beforehand would have, on account of the markedness of the obesity, and yet we have been surprised at the low percentage that we get minus readings in.

Q. Is it your opinion that the dosage of half a grain four times a day to an obese patient who is otherwise normal, if continued for sixty to ninety days, would cause hyperthyroidism?

A. I would feel that it would throw a certain percentage of obese patients, if taken for sixty to ninety days, over into hyperthyroidism or a condition so closely akin to it that you could not distinguish it.

Q. You do not add also what I said, that he was otherwise normal.

A. Yes. If you can consider a person with a susceptibility to thyroid—because we know that a great many people are very susceptible to thyroid substances:

Q. A great many people are sensitive to strawberries, are they not?

A. Yes, but there is no comparison. I do not think that is fair.

Q. No comparison in number or in the item?

A. In the number or in the ill effects.

Q. I am trying to get the number. I do not intend to compare strawberries with thyroids.

A. I do not believe so. I believe you would find five times as many people susceptible to thyroid as would be susceptible to strawberries.

Q. Those people come definitely within what you would otherwise would think was a normal reaction to thyroid? Is that it?

A. Yes.

Q. Do you think that half a grain of thyroid four times a day given to obese people otherwise normal and healthy would create hyperthyroidism in any large percentage of them?

A. I think it would. I really do. I do not believe that men in active practice of medicine would dare use two grains of thyroid a day on obese patients, certainly without frequent observation. There have been so many things happen that we have definite records of, that are in the literature, that the medical profession generally are awfully wary of the use of the drug.

Q. Do you use it now more than you used to?

A. Yes, because we feel a lot safer now with the metabolism machines and we know a lot more about it. I

think the Mayo Clinic and other clinics have demonstrated pretty much what we can do and what we cannot do, but I do not think in the days of its earlier use the cases were as carefully observed and that point insisted on as today.

Q. You told us about a nurse that took some thyroid that came under your observation. Do you know anything about the amount of thyroid she took other than what she told you?

A. No, I do not other than what she told us. We had every reason to feel that she— ..

Q. (Interrupting) I just wanted to know the source of your information. It came entirely from the nurse?

A. Yes, it came entirely from the nurse.

Q. In those cases of thyroid medication which you undertook yourself, were they to some extent successful?

A. I think most of them were, yes, by the administration of thyroid plus exercise, and were able to reduce satisfactorily.

Q. Were those results permanent or transitory?

A. They are only permanent in that the patient keeps up the diet and keeps up the exercise. When you get them down to normal or approaching what the ideal weight is, if they begin to forego exercising and begin overeating, of course—

Q. (Interrupting) I understand that will ruin anything you have done for them?

A. Yes.

Q. But what I mean to say is that those are cases which would not reduce with your system of diet and exercise satisfactorily?

A. That is right.

Q. So you added thyroid medication?

A. Yes.

Q. And you were then able to reduce them satisfactorily?

A. Yes.

Q. And when they reached the satisfactory stage, if they continued to exercise and diet reasonably they remained at the proper weight?

A. Obese patients are very unsatisfactory patients in that most of them, as I said a while ago, have very good appetities, and especially they like carbohydrates and so forth, and while I have not followed them up very carefully to know whether they are all still near their ideal weight, yet so far as I can say I think they have most of them that I do know anything about held at a reasonably good weight level.

Dr: William Earl Clark Robert W. Keeton

Mr. Gust: I think that is all.
(Witness excused.)
The Commission Rests.

Examiner Averill: I understand that the Commission rests.

Mr. Hornibrook: Yes, the Commission rests at this time.

Adjournment.

(After discussion off the record.)

Examiner Averill: The beginning of the taking of evidence on behalf of the respondent will be set for Chicago, Illinois, at the office of the Federal Trade Commission, beginning at 10 o'clock a. m., on Thursday, October 25, 1928. The hearing stands adjourned until that time and place.

(Thereupon at 3:45 o'clock p. m. an adjournment was taken until Thursday, October 25, 1928, at 10 o'clock a. m., at the office of the Federal Trade Commission, in Chicago, Illinois.)

Chicago, Illinois, October 25, 1928.

Met pursuant to adjournment, 10:00 o'clock A. M.
Before:

Edward M. Averill, Examiner.

Appearances:

Edward J. Hornibrook, for the Federal Trade Commission, Washington, D. C.

R. M. Connors, 560 Equity Building, Detroit, Michigan; Rockwell Gust, 2214 First National Bank Building, Detroit, Michigan, and Robert E. Cantwell, Jr., 1105 Hartford Building, Chicago, Illinois, for the respondent.

Exam. Averill: You may proceed, gentlemen.

Mr. Cantwell: Doctor, will you take the witness stand?

ROBERT W. KEETON was thereupon called as a witness, and having been first duly sworn, testified as follows:

Direct Examination by Robert E. Cantwell:

Q. What is your name?
A. Robert W. Keeton.

Robert W. Keeton

Q. Where do you reside?

A. 7301 Sheridan Road, Chicago.

Q. Where are your offices?

A. 25 East Washington Street, and 1515 Howard Street.

Q. What is your profession?

A. Physician and teacher.

Q. Where did you receive your education?

A. I graduated from the University of Chicago in 1906, with a bachelor's degree; master of science in 1913 and doctor of medicine at Northwestern University in 1916.

Q. What teaching positions have you held in the past?

A. I have been assistant in physiology at the University of Illinois and at the University of Chicago. I have been assistant in pharmacology at the University of Illinois and at Northwestern University. I have been assistant professor of pharmacology and associate professor of pharmacology at the University of Illinois. I have been adjunct professor of physiology and bio-chemistry in the Albany Medical College. I have been associate member of the Otto S. A. Sprague Memorial Institute Laboratory and Clinical Research of Chicago. I have been instructor in medicine and associate in medicine of Rush Medical College of the University of Chicago. I have been associate professor of medicine in the University of Illinois and am now professor of medicine in the University of Illinois.

Q. In your present position, doctor, what medical subjects do you teach?

A. I teach general medicine and give curses with special reference to the subjects which are sometimes grouped under the name of metabolic diseases, which include diabetes, thyroid diseases, internal gland deficiencies, diseases of glands of internal secretion.

Q. What medical societies are you a member of?

A. I am a member of the Chicago Medical Society, Illinois State Medical Society, a fellow of the American Medical Association, member of the Society of Internal Medicine of Chicago, and of the Institute of Medicine of Chicago.

Q. What subjects of study have you done research work in and are you now doing research work in, doctor?

A. My first work was undertaken in the years of 1910 to 1912. At that time I was studying the secretion of the

gastric juice in parathyroid tetany. I then followed with a series of studies on gastrin bodies. There were five of these.

The first was the distribution of gastrin in the body. The first were further studies in the distribution of gastrin bodies. The third was the response of gastric mucosa of different animals to gastrin bodies.

Q. Are those papers that you have written?

A. These are papers that have been published.

Q. Proceed.

A. The response of gastric mucosa to food and gastric bodies as influenced by atropine.

Chemical studies in gastrin bodies.

I then published two papers on hypophysis. One of these is the stimulation of the hypophysis in dogs. The second was the relation of the hypophysis to glycogenolysis.

Then a study in the mechanism of either hyperglycaemia.

Two papers were published on influenza. One of these is influenza as a type of toxaemic shock.

The second was a statistical study of influenza.

One paper was a study on the administration of acids to dogs by way of the peripheral vein and by the stomach.

Then there were two or three papers on the subject of fevers. One was the production of vaccine fever in poililothermous animals.

A second one was the peripheral loss of water as a factor in heat regulation, on rabbits.

A third paper was further studies in water loss.

Then I published four articles on diabetes. One concerned the use of insulin in the treatment of diabetes; the second of treatment of diabetes from the viewpoint of the general practitioner.

The third was two cases of diabetes.

The fourth was the estimation of the severity of the diabetic defect, two cases.

I published more recently some studies on the subject of obesity. One of these is the weight of obese patients on a diet high in protein but inadequate in calories.

Another subject studied was the effect on the weight curve of hogs, of varying amounts of carbohydrates in the diet during under-nutrition.

Q. These papers you say you were the author of were published by different medical journals?

A. They were published in different medical journals

and in many cases there were co-authors. In only one case was there a senior author other than myself. These papers have appeared in the American Journal of Physiology, Journal of Biological Chemistry, Journal of the American Medical Association, Illinois State Medical Journal, Archives of Internal Medicine.

Q. What are your hospital connections?

A. I am attending physician to Cook County Hospital, the St. Francis Hospital of Evanston, Associate attending physician to the Augustana Hospital, and to the Research and Educational Hospital of the University of Illinois, and on the consulting staff of the Chicago State Hospital.

Q. Of what does your general practice consist, doctor?

A. It is confined to internal medicine, and a good portion of this practice includes patients who have diabetes and who come to me for treatment for obesity and similar disorders.

Q. You are licensed to practice medicine in the state of Illinois?

A. Yes.

Q. When were you so licensed?

A. In 1916.

Q. You have had considerable experience in the treatment of obesity?

A. Yes.

Q. And you have had considerable experience in thyroid medication?

A. Yes.

Q. And you have had considerable experience and research work a knowledge of thyroid medication?

A. Yes.

Q. Have you from your training and experience and

A. I have.

Q. Doctor, will you tell us what is the United States Pharmacopeia?

A. The United States Pharmacopeia is the official publication of the pharmacal convention. This contains drugs and compounds of therapeutic value and pharmaceutical necessity.

Q. By whom is it written?

A. It is compiled by a committee of the convention. This committee is now known as the committee on revision and is comprised of the leading members of the leading departments of pharmacology, pharmacy, botony, chemistry and medicine scattered throughout the country, representative members on these subjects.

Q. By whom is the United States Pharmacopeia accepted?

A. It is accepted by all state and federal courts, by the American Medical Association and the American Pharmaceutical Association and by the individual members of these associations.

Q. You said it contains a list of the standard drugs.

A. Yes.

Q. Does it give the average dose of the drugs mentioned in it?

A. It does.

Q. And can you classify the dosage of these drugs?

A. They may be inert or physiological. They may be therapeutic, toxic or ethal.

Q. Is the United States Pharmacopeia dose at any one time, or is it the dose on which most physicians base their concept of an initial dose?

A. It is the dose that is usually considered an initial dose.

Q. Is the United States Pharmacopeia dose the total daily dose, or is it the standard dose to be given twice a day or three times a day or oftener as the physician thinks best in his own case?

A. It is the dose to be repeated at the discretion of the physician.

Q. Doctor, what is the United States Pharmacopeia dose of dried thyroid?

A. One grain.

Exam. Averill: What was that, doctor? I could not hear you.

The Witness: One grain.

Exam. Averill: One?

The Witness: Yes.

By Mr. Cantwell:

Q. And what is the United States Pharmacopeia dose of extract of cascara?

A. Five grains.

Q. What is the United States Pharmacopeia dose of phenolphthalein?

A. One grain.

Q. How much dried thyroid is necessary to increase the basal metabolic rate to .8 units?

A. We can measure the effect of thyroid medication best in myxedema patients, that is, patients who are totally bereft of their thyroid gland. When such patients are

given thyroid the response is metabolic. Four and one-half grains of thyroid given to such patients raises the rate 2.8 per cent.

Q. To raise the basal metabolic rate 25 per cent above normal, would require, therefore, how much dried thyroid?

A. Approximately 40 grains, 39 and a fraction.

Q. What do you consider normal for the average individual? I mean the range of the metabolic rate?

A. It is plus 10 per cent to minus 10 per cent.

Q. Can thyroid tablets be purchased on the open market without a doctor's prescription?

Mr. Hornibrook: Wait a minute. I object to that as immaterial and irrelevant.

Mr. Cantwell: I think it is material, if the Examiner pleases.

Exam. Averill: The objection is overruled. If the gentleman knows, he can state.

By Mr. Cantwell: If he knows?

Exam. Averill: Yes.

By Mr. Cantwell:

Q. Do you know, doctor, if they can be purchased?

A. Yes, they can be purchased.

Q. And in what amounts, do you know?

A. From one to five grains.

Q. What is the use of and what are the indications for cascara?

A. Cascara is a laxative. In larger doses it becomes a cathartic.

Q. How does it function when taken into the human body in therapeutic doses or less than United States Pharmacopeia doses by persons who need it?

A. It stimulates the peristalysis or activity of the colon, the large bowel.

Q. What is the use and what are the indications for phenolphthalin?

A. It is used as a laxative and as a cathartic.

Q. And how does it function when taken into the human body in therupeutic doses or less than United States Pharmacopeia doses by persons who need it?

A. It stimulates the lower portion of the small intestine and the large bowel.

Q. What is the use and what are the indications for thyroid?

A. Thyroid has been used in many situations. It is

used, first, in all conditions in which there is a decreased metabolic rate. Of these conditions we may enumerate cretinism, myxedema and hypo-thyroid states. It is used in the treatment of obesity. It is used in certain skin conditions, such as psoraisis and acne vulgaris. It is used in many cases to promote the growth of children. It is used in cases of mental deficiency in children. It is used in cases of necrosis.

Q. Doctor, you said it was used in cases of obesity.

A. Yes, sir.

Q. Have you used it in your practice?

A. I have.

Q. How does thyroid function clinically when taken into the human body in therapeutic doses or less than United States Pharmacopeia doses?

A. It may increase the metabolic rate of the individual. This is a measurable result and can be determined. It may simply accomplish a clinical improvement in the patient, which is determined by clinical observation and not by measurement by any specific types.

Q. Now, is thyroid in United States Pharmacopeia doses or less than United States Pharmacopeia doses habit forming?

A. No.

Q. Is thyroid in United States Pharmacopeia or less than United States Pharmacopeia doses toxic?

A. No.

Q. Is thyroid in United States Pharmacopeia or less than United States Pharmacopeia doses lethal?

A. No.

Q. Can you explain what is meant by the word "toxic"?

A. Toxic action is an action which produces an injurious result in a patient. This result may be found in actual anatomical and pathological changes or it may be found in simple physiological changes.

Q. What is meant by the word "lethal," doctor?

A. Lethal is a death producing dose.

Q. What is meant by "idiosyncrasy"?

A. It is an unusual and an unexpected action, an unpredicted action.

Q. In connection with what, doctor?

A. With any situation or any disease, for that matter. A person who manifests an idiosyncrasy to a drug; it is an action that was not expected when the drug was given, nor was it a predicted action.

Q. Can you give us some examples? It can apply to food, can it not, doctor?

A. Yes. We have, for instance, certain people who may become sensitized and are sensitized to types of food. For instance, shell fish; that person might eat a lobster and his associate might eat a lobster. His associate suffers no symptoms whatsoever, but the particular person in question might develop a marked skin reaction, become short of breath and develop generalized edema that was an unexpected reaction.

Q. Can there be idiosyncrasy to a substance which is normally present within and continuously made by the body?

A. Yes.

Q. Is thyroid such a substance?

A. Yes.

Q. Will you describe the basal metabolic rate and how it is tested?

A. The basal metabolic rate represents the rate at which the body is utilizing energy at its lowest point. I sometimes say that it represents the energy required to keep the idling machine working. This energy, of course, is energy which is used by the body in the beating of the heart and in the secretion of the various juices and in the maintenance of muscular tone. This rate must be measured with the patient at absolute rest, both mentally and physically. It must be measured in the so-called post absorptive state. That means when the body is free from the absorption of foods.

It is estimated by determining the amount of oxygen or by the amount of carbo-dioxide and oxygen both which the patients consume and produce in a given period of time. If we then know that the patient consumes a given amount of oxygen in a period of time and if we know the calorific value of that oxygen, we can then say that person is burning a certain number of calories in that length of time.

If now we find that patient has a certain surface area, then we can say that this patient with a certain surface area is burning so many calories. We can therefore determine how much a patient of this type would burn for one square meter of surface area. If we know how much he will burn for one square meter of surface area in an hour, we can multiply it by 24 and we will then have the number of calories which this particular individual is using over a day's time.

This can be compared with the rate at which normal individuals utilize energy. If this varies from the normal, above or below, it can be determined as a certain

percentage varies, and that percentage variation is spoken of as the basal metabolic rate.

By Exam. Averill:

Q. It is the variation then that is spoken of as the basic rate?

A. Yes. His rate is either normal or it is plus 10 above normal, plus 20 above normal, and minus 20 below normal or minus 30 below normal.

Q. Then am I correct in understanding that the variation is the normal? I would have thought that the rate would have been what you ascertain after your calculations to be the number of calories and so forth consumed by the patient.

A. It is.

Q. Then if it went above or below that, that would be the variation from it?

A. Yes, that is correct. We measure the actual caloric utilization of this patient. That is his rate. Then in order to express it in terms of basal rate—

Q. Basal?

A. Yes, basal. We then compare it with what the normal individual of his size would furnish in that time. We compare him with the normal and sometimes by that comparison we say this particular man's rate is plus 10 per cent above a normal individual, do you see?

Q. Yes.

A. But we must first know the normal and we must know how much this man rated. Then by knowing the two we can see the difference in the variation.

Exam. Averill: Thank you. That is all.

By Mr. Cantwell:

Q. Doctor, do certain things cause a variation in the metabolism of a normal individual?

A. Yes. The metabolism may be increased by any form of activity, whether it is the simple movement of the arms. Restlessness during the test will cause a variation. It will also be increased by the taking of food and may be increased by mental disturbance of any kind. Metabolism, in other words, is readily influenced by surrounding factors and conditions.

By Exam. Averill:

Q. It is rather difficult, then, to get a patient in the exact position in which you desire him to make a very close test, is it not?

A. That is quite right.

By Mr. Cantwell:

Q. What is the effect of thyroid medication on metabolism?

A. Thyroid medication simply accelerates the normal metabolic processes. It may increase their action simply by speeding them up. It does not change the character of this response. It has been found in certain cases that following the administration of thyroid extract to patients who are bereft of thyroid gland, that there is a marked increase in the secretion of nitrogen following the administration of this thyroid. That is associated with the accelleration of the metabolism, which we measure by saying it is an increase in the metabolic rate. This throwing out of nitrogen continues to occur until the patient comes to the normal rate, and after that the patient again swings into nitrogen equilibrium.

Q. When did the estimation of the basal metabolic rate become applied clinically?

A. It became a clinical application in the years 1918 to 1920.

Q. When did thyroid extract become commonplace and available for administration?

A. Between 1896 and 1900.

Q. Have all doctors in the country reasonable access to basal metabolic rate estimations?

A. No.

Q. Have all patients in the country access to basal metabolic rate estimations?

A. No.

Q. Does thyroid medication increase the metabolism of the patient?

A. It may.

Q. May thyroid medication be properly given in cases where the basal metabolic rate is normal?

A. Yes.

Q. What happens, doctor, chemically within the body when the average person takes thyroid?

A. Perhaps I have answered that question or anticipated the answer to that question in my description of the effect of thyroid a moment ago. When an average

individual takes thyroid the rate may be increased or it may not be increased. When the average individual takes thyroid and we examine the urine, we may find that for a brief period of time there is an increase in the nitrogen in the urine. If the patient's food is maintained he then again swings back into nitrogen equilibrium. In other words, the amount of nitrogen that comes in his food is exactly equal to that which appears in the nitrogen.

This subject has been investigated by Boothby and his associates fro mthe Mayo clinic, and they have come to the conclusion that the administration of thyroid to normal individuals decreases the quantity of what is termed the deposit nitrogen or circulating nitrogen in the body. They believe that in myxedema we have a large increase in the deposit of nitrogen, so when the individual takes thyroxin or thyroid, that amount is thrown out and they believe that in their change from a myxedemic into a normal individual, they have changed their circulating nitrogen or deposit nitrogen and have made it more available for activity; they have decreased it. That same action can to a slight extent occur in a perfectly normal individual who has no pathological excess of deposit or circulating nitrogen.

Q. This nitrogen loss that you speak of, that is noticeable in the output of urine does not represent any muscle tissue loss, does it, doctor?

A. No. We regard nitrogen equilibrium—we ordinarily state that patients are in nitrogen equilibrium. We mean by that if a patient is taking in a certain number of grams of nitrogen a day, which of course corresponds to a certain amount of protein, we expect to find in his secretion, his urine, the same amount of nitrogen corresponding to the same destruction of protein. If we withdraw from that patient the nitrogen and still give him all of the other foods, we still find there is a minimum amount of nitrogen which cannot be eliminated. This minimum amount of nitrogen requirement is spoken of as the wear and tear nitrogen and represents the output of the body in the replacement of parts, as it were, in the machine. All of the nitrogen above the minimum nitrogen represents more or less traffic nitrogen or nitrogen which is in some way or other responsible for keeping the machine working—we do not know exactly how. This deposit or circulating nitrogen may in the myxedemic patient be represented by a column of two cylinders of that height. (Indicating.)

Robert W. Keeton

Exam. Averill: About what height is that?

The Witness: For the sake of our illustration, we will say a foot high. When that has been changed and reduced, we will say that four inches in height represents that circulating nitrogen and is the circulating nitrogen found in the normal individual. So the nitrogen which appears in the urine following the administration of thyroid gland comes from this source.

By Mr. Cantwell:

Q. Now, doctor, in your previous answer, you used the term "thyroxin." Will you explain the difference between thyroxin and thyroid?

A. Thyroxin is a crystalline chemical compound which has been isolated from the thyroid gland and which is now regarded as the active principle of the thyroid gland. This active principle does produce an effect on the metabolic rate or the same effect on the metabolic rate which is seen after the administration of desiccated thyroid.

Q. What is the iodine content of thyroxin?

A. Sixty-five per cent.

Q. Therefore, it is much more potent than thyroid per unit weight?

A. Per unit weight, yes.

Q. What is the iodine content of dried thyroid?

A. It varies between .17 and .23. Approximately .2 of 1 per cent.

Q. As a rule, doctor, what is the basal metabolic rate of fat and obese persons who are otherwise healthy except for their obesity?

A. It is normal.

Q. If a person has a basal metabolic rate, that is ten points above normal, is that a symptom of any injury going on in that person's body?

A. No.

Q. What is the significance of a rate of plus 25?

A. That may be due to many causes. We may have a real hyperthyroidism or an over activity of the thyroid gland. We may have a severe anemia. We may have a leukemia. We may have a Hodgkin's disease. We may simply have a nervous and excitable patient who does not lend himself easily to basal metabolic estimations.

Q. How much thyroid did you say it would take to make the average individual's rate go to plus 25?

A. Approximately 4 grains.

Q. That means in one dose?

A. Yes, or given within a reasonably short period of time.

Q. Doctor, will you tell us about obesity, the various types and causes and symptoms and how people become obese? I do not want you to talk at this time about the treatment for obesity.

A. If I may—would you mind asking me that question again?

Q. Will you tell us about obesity?

A. Yes.

Q. The various types, causes, symptoms and how people become obese?

A. We ususally define obesity as a condition in which the patient's weight varies from the normal by 15 per cent or more. That is the definition I have given to my students. We have not any exact or chemical definition of obesity. We do not know the metabolic disorder which causes obesity. Therefore, I prefer to state that a patient is obese when he is 15 per cent or more above the normal weight for a person of his height.

We sometimes speak of obesity as of exogenous origin. By this we mean that the patient eats more food than he requires and does not exercise very much and so he accumulates weight.

We meet another class of cases which we speak of as endogenous origin. By this we mean that these people apparently do not eat an excessive quantity of food and yet we find them year after year getting heavier and they tell us they are quite active in their exercises. It has been supposed that this class of obesity is due to some glandular defect by which the body stores the food.

Q. Now, doctor, will you describe in general the treatment for obesity?

A. If I may divide this first into the treatment of obesity by means of diet adjustment—I will speak of that first because I perhaps can make my points clearer.

It is obvious that if a person of a certain size and age requires a certain amount of food, that if we are going to make that patient lose weight, we must give him less food than he requires. We must establish a positive deficit in food. When we do that we find that the obesity cases fall into two groups. In one of these groups the patient will lose very easily and very readily, by almost a mathematical rate. We can say that having established a certain deficit in the diet we will expect them to report week after week and they will have two and a

half or three pounds or so lost each time. Perhaps this case, we might say, falls into the exogenous class of obesity. If we examine the urine of these patients, as I have done—I have records of four such patients who have lost over 100 pounds with diet adjustments alone—if I examine the urine adjustment of those patients fully, I find there is an increased output of nitrogen in the urine over the nitrogen that they take in in their food. In other words, here are some people who have lost a hundred pounds and who are apparently in perfectly good health at the end of that time, and yet all of that time they have been in negative nitrogen balance, as we say.

Now, my explanation for that is that this particular patient, this nitrogen must come from and does come from some chemical that is in these stored reserves, so that when the stored reserves are released, it is perfectly obvious that the nitrogen manifestations as they are stored also appear in the urine.

The question next arises as to what is going on in this body, where this energy comes from. That introduces the necessity of explaining what happens to the mechanism in the utilization of energy in any normal individual.

We secure the energy for running the body from protein, carbohydrates and fat foods. There are other types of food but they are not energy producers, so we will not include them in this discussion.

If we are going to get energy for driving this machine, we must secure it from the proteins of the carbohydrates or the proteins of the fat. Protein will yield energy, but it yields it only after it has been converted into carbohydrate or into fat.

Therefore, in the last analysis we do not secure energy to drive the machine from any source except carbohydrates and fat.

It has been definitely established that the body will in muscle contraction use carbohydrates preferentially. In other words, there is a sufficient amount of carbohydrates and glucose in the bloodstream and that is brought to the muscles and then the muscles will use that. When that source fails somewhat, or along with that source it becomes necessary to utilize the fatty acids, so it gets its nourishment from those.

Therefore, when a fat individual is subjected to diet restrictions alone, he calls into play this same normal mechanism which he utilizes when he is taking food.

He therefore calls on the carbohydrates in his food and carbohydrates that he has in his body for part of the source of the energy and he calls on the fat for the remaining source of the energy.

That, I believe, is the normal process which goes on when a patient is subjected to diet adjustment with a deficiency in his diet.

A second agent that may be used to cause a reduction in the weight is either massage or exercise or some form of increased muscular activity. It is obvious that if the patient exercises he requires more energy for his machine. If he is subjected to massage, he has a form of passive exercise, and therefore there is an increased requirement.

So exercise then and massage and such similar measures simply increase the deficit and make weight loss greater because of the demands of the body that is calling on its stored foods to secure this energy.

If we take a second type of patient, which has sometimes been spoken of as the endogenous type, we find that when we subject them to this same regime, that is, put them in the hospital and allow them to walk around the room, take a short walk outside, feed them on a diet which is definitely below their requirements, that very different things happen.

We find that their weight may go along for a period of a month of six weeks and sometimes even longer or shorter, but then there will always be a long period in which there will be a stationary weight and then there may be a rather sudden drop of a few pounds, and then there will come another period of maintenance of weight and then another sudden drop. So that the loss will come with great difficulty and the curve of their weight loss is a very irregular one.

I reported last year before the Society of Biology and Experimental Medicine the record of two such cases that I had under very close observation for eighteen months. In one of these cases I showed that the patient practically maintained her weight of 200 pounds over eight months time with no appreciable loss, even though she was eating a diet which was greatly below her requirements. A second patient over a period of six or eight months lost only about a fourth of the expected weight and there would be periods of six to eight weeks time during which her weight remained stationary, in spite of the fact that she was on this very low diet.

That, therefore, then indicates a situation which has

not been solved. The question arises: Why do these people not lose weight? We have no answer to that. It has been believed by many investigators that if we could make these people lose water, establish them in the loss of water, we would then reduce them to a uniform weight loss. So there have been many methods which have been attempted to cause these patients to lose water. For instance, catharsis. Some people give cathartics to a patient of that kind. If they give cathartics, it is perfectly obvious they will rush water through the intestinal tract, they will concentrate the blood, and if they concentrate the blood, they will then make the tissues give up water. That is the theory on which it works.

Another attempt has been made by subjecting these people to baths, causing them to sweat. We know that during the sweating process there may be a change in the concentration of the blood. That has been shown very definitely, that we may have either concentration or dilution of the blood. So sweating has been used as a means of making the patient lose this water.

Another attack that has been made on the subject is to feed these patients no salt, put them on a salt free diet. The idea in that case is that salts have a tendency to hold water, and as they hold water and we restrict them in the diet, the loss from water will be easier.

Personally, I believe that the use of thyroid is valuable in this specific situation. I believe that thyroid when given to these patients enable us to cause them to lose water and once they start to lose a little water, then their weight goes down and we have them established at a different level.

I consider, therefore, then, that thyroid is an agent which enables us to cause water loss and that this may be caused without increasing the metabolic rate of a patient.

Now, then, when the dosage of thyroid is increased so that the metabolic rate is also increased, we then have exactly the same effects produced in the patient as that of making the patient exercise. You will recall that I said exercise simply increased the deficit between the requirements of the patient and what he was eating. Now, thyroid administred in doses which raised the metabolic rate simply increases that activity. I have made the statement before that thyroid simply accelerates normal processes and is in the line, therefore, of exercise.

Robert W. Keeton

Q. When an obese person reduces he uses up first the glycogen and fats?

A. Yes.

Q. And therefore that causes him to lose weight?

A. Yes.

Q. Now, the nitrogen loss that is present in the urine you say does not represent destruction of muscle tissue?

A. Yes.

Q. You have used thyroid medication, doctor, for some time?

A. Yes.

Q. What range of dosage do you use?

A. I usually use two grains a day.

Q. Have you used more than two grains a day?

A. Yes.

Q. As high as what?

A. I have given as high as eight grains a day.

Mr. Cantwell: Your Honor, may we get the exhibits in this case that were put in previously?

Exam. Averill: Certainly.

By Mr. Cantwell:

Q. Doctor, I will show you Commission's Exhibit No. 3, which consists of a package, a Marmola package, a booklet enclosed in the Marmola package, and the Marmola tablets themselves and a piece of paper on Dilaxin and also a few Dilaxin tablets. Are you familiar with the Marmola package, Commission's Exhibit No. 3 in this case?

A. I am.

Q. And are you familiar with the booklet that is enclosed in the package?

A. I am.

Q. And you have read that, doctor?

A. Yes.

Q. Now, doctor, may I quote verbatim from this booklet some comments or advice or guidance in the treatment of obesity by this particular method?

"Consult your own physician in any unusual condition. This is for the average obese person simply seeking to reduce. If you want more advice than we give you in this book, get it from a man who can meet you. Reasonable habits and diet and exercise is recommended. The bowels should move once or twice a day."

Robert W. Keeton

Doctor, what is your opinion on that advice for reducing obese people?

A. I think the advice is good.

Q. And, doctor, in the treatment of obesity will you tell us the rule of proper elimination?

A. As I have suggested in my answer a few moments ago, this tends to insure a uniform loss in water, which is highly important in keeping patients reducing uniformly.

Q. Can the average obese person without medical supervision take Marmola tablets for a period of sixty to ninety days under the instructions, directions and advice contained in the booklet and on the package without harm?

A. Yes.

Q. Would the Marmola tablets according to the instructions, the advice and the directions contained in the booklet and on the package be effective to reduce weight in the average obese individual?

A. Yes.

Q. Doctor, have you an opinion as to whether this formula is based on scientific research and accuracy?

A. Yes, I have.

Q. What is that opinion?

A. That it is, for these reasons: As I have previously indicated, weight loss, uniform water loss must be established. The cathartics included in these tablets should tend to cause water loss. In the same way the thyroid should be beneficial in causing water loss.

Q. Assuming, doctor, an average obese person, healthy except for his obesity, who takes thyroid medication in doses equal to or less than the United States Pharmacopeia doses and who loses some of this excess weight, what would be the net effect on his general health and muscular tone?

A. Patients who have undergone a rate reduction usually feel much better. They feel stronger, able to climb the steps more readily, because now they may be relieved of fifty to 100 pounds of weight which they were carrying formerly. Threfore, it causes less work on the heart. They are often relieved of a sense of stuffiness and discomfort of which they complain. The muscle tone is improved and not infrequently we notice a rather marked decrease in blood pressure in some of these cases.

Q. Doctor, do you know from your knowledge or experience of any large group of persons who take doses of thyroid as large or larger than two grains a day continu-

ously for several months without injurious results? If you do, will you please tell us about it?

A. In 1926 Kitchen reported some studies on children to whom he fed thyroid extract in doses of two grains daily over a period of four to six months time. To be exact, there were twenty-four children in this group. He observed in this period of time no symptoms whatever.

This thyroid was given to these children because they had a slight enlargement of the neck and it was his desire to see whether in children with enlarge thyroid glands these glands would be more readily under the use of thyroid or whether they would subside spontaneously or whether they would subside better under Lugols' solution or iodine, which has usually been used.

His conclusions were that by the administration of thyroid to these patients the glands were reduced more under the thyroid medication and that the patients tolerated the drug very well and were without symptoms over a period of four to six months time, securing or taking as an average two grains per day.

More recently Topper and Cohen have shown that thyroid may be given to children beginning with a dose of 1½ grains and increasing it to as high as nine grains in some cases and twelve in others. There were six experimental cases followed over a period of two to six months, I believe. In none of those cases were there any bad effects. These were normal children. They had no disease whatever.

Q. These three names you mentioned, will you for the sake of the record tell us who Kitchen is?

A. Kitchen, I believe, is professor of medicine at Manitoba. I am not certain of that. The reference can be found in the Canadian journals.

Q. And who is this man Topper?

A. Topper and Cohen have published in the American Journal articles of the diseases of children in 1928.

Q. What is the average and what is the range of the basal metabolic rate in true hyper thyroidism?

A. In true hyper thyroidism?

Q. Yes.

A. I never like to make a diagnosis of hyper thyroidism under a plus 25 per cent.

Q. In other words, the patient has to have at least 25 per cent?

A. Unless that patient has been previously operated on or has been previously known to have a high rate.

Robert W. Keeton

Q. How high does it go? You say that is the minimum.

A. In several cases that rate may go to plus 100 per cent. That means not only their own rate by a hundred times, or it may go to 125. We have the severe cases usually in plus 60 to plus 90.

Q. Would a reduction of three or four pounds a week in an obese person be of itself dangerous to that individual?

A. No.

Q. It has been said in this hearing that a person, say, over sixty years of age thyroid absolutely should not be administered. Do you concur with this view?

A. No.

Q. What are the reasons for your opinion?

A. I consider that thyroid is given for a specific reason. If that reason exists in a patient over sixty years of age, I would use it.

By Exam. Averill:

Q. You mean the age would not determine the question?

A. Yes, not necessarily an indicator.

By Mr. Cantwell:

Q. Doctor, can this Marmola remedy be taken safely according to these directions and advice without previous consultation with a doctor?

A. Yes.

Q. Doctor, in your opinion would this Marmola remedy, if taken according to the instructions, directions and advice contained in the booklet, constitute a scientific treatment for obesity?

A. Yes.

Q. Doctor, in your opinion, is this formula based upon scientific research and accuracy, and what are the reasons for your opinion?

A. I believe it is. For these reasons: I consider scientific research and accuracy as an expression of our knowledge, the best knowledge we have available today. I have tried to indicate why I thought that the use of thyroid is in keeping with the best knowledge we have today. Van Norden has within the last two or three years—I cannot give the exact date of the reference—published an article in which he summarizes his experience with the use of thyroid over a period of thirty years

time. Van Norden, of course, has been the dean of all of the workers in metabolism. He still believes that thyroid is a very useful agent in the treatment of obesity.

Q. Doctor, in your opinion would you say that this prescription, Exhibit 3, of thyroid combined with laxatives and accompanied with the directions, advice and instructions above mentioned in the booklet is a practical and available remedy for the average case of obesity?

A. Yes.

Q. Doctor, will a half a grain of thyroid taken four times daily in the combination above described and under the instructions in the booklet produce toxic symptoms in the average obese person, otherwise healthy except for his obesity, who takes it?

A. No.

Q. Doctor, would the thyroid compound mentioned here, which contains a half a grain of thyroid substance, a quarter of a grain of extract of cascara, a quarter of a grain of phenolphthalin given four times a day for from sixty to ninety days and using the same dosage as indicated in the previous questions be useful and effective in dissolving and removing excess fat from the human body?

A. Yes.

Q. You said some time back in one of your answers that forty grains would raise the basal metabolic rate to plus 25.

A. Yes.

Q. You do not mean by that answer that two grains given for twenty days would do that?

A. No. We have to consider in that the rate of decay of the thyroid extract. By decay we mean as time indicates its loss of action.

By Exam. Averill:

Q. In other words, to put it in laymen's language, you take a half a grain of it at six o'clock in the morning and take another half a grain at twelve o'clock in the day, there would be some loss occurring in those six hours, between the time that you took the first and the second?

A. I would not say in six hours, but that is the principle.

Q. I just wanted to get the principle.

A. Yes, that is the principle exactly.

Q. I was not confining it to that specific time.

A. No.

Q. I just wanted to get an idea of what you meant.
A. Yes.

By Mr. Cantwell:

Q. Doctor, how much thyroid substance does the average human gland manufacture in the body itself a day?

A. We manufacture approximately 1½ to two grains a day, the average individual does. That is the normal output of thyroid from the thyroid gland.

Mr. Cantwell: Cross examine.

Cross-examination by Mr. Hornibrook:

Q. Doctor, you were employed by the respondents to come here and testify.
A. I was employed to appear here.
Q. I did not get the answer.
A. I was employed to appear here, yes.
Q. Are you a member of the American Medical Association?
A. Yes.
Q. Is it usual for physicians to appear and give testimony when these proprietary remedies are on trial?

Mr. Cantwell: Your Honor, I object to that.

Examiner Averill: Let him finish his question first.

Mr. Cantwell: I beg your pardon.

Examiner Averill: Will you please read that question. I believe it has been completed.

(Question read by reporter.)

Mr. Cantwell: I object to the question.

Examiner Averill: I do not exactly understand the question Mr. Hornibrook. Does the question mean to ask the Doctor if it is usual for gentlemen of the medical profession to appear from time to time before courts or before investigating bodies to testify as to the effects of certain preparations? If that is the meaning of the question, I can see no objection to it.

Mr. Hornibrook: In favor of the respondents or defendants, as the case might be. I might add that to the question.

Mr. Cantwell: If the Examiner pleases, I certainly object to the part whether it is in favor or against.

It does not make any difference. He says in favor of the respondents.

Examiner Averill: I think, gentlemen, if the question is whether it is usual for them to appear and testify whether for the plaintiff or for the defendants, that it is a perfectly proper question.

Mr. Hornibrook: I will withdraw that question and put another question. Do you have an office here in Chicago, Doctor?

A. Yes, at 25 East Washington Street and 1515 Howard.

Q. How long have you been engaged in the practice of medicine?

A. I graduated in 1916 and have been practicing since 1918, the latter part of 1918, or the first of 1919.

Q. You say that you have had a number of obesity cases. Can you give us some idea of the number you had?

A. I have had, or see obesity cases in two capacities. I see them in the dispensary of the University of Illinois clinic. It is a little hard to say how many go through there. We will see approximately—we are averaging now about eight to ten a week of obesity cases. I have been connected with this clinic for three years. I have treated in private practice, approximately 250 people.

Q. Is it your custom and your practice to give thyroid remedy in all cases of obesity?

A. No.

Q. Is it not your custom generally to treat them with diet and exercise?

A. I treat all my patients with diet. I say not a great deal about the exercise.

Q. There are many patients, obesity patients, which you have for whom you do not prescribe thyroid at all, isn't that a fact?

A. There are some obesity patients that do not get thyroid.

Q. Before you prescribe thyroid, would you not submit the patient to a physical examination?

A. I make a careful physical examination of all patients that I treat.

Q. And you would do that before you would prescribe thyroid?

A. I would do that before I would prescribe anything.

Q. I believe you said thyroid should only be given in cases of decreased metabolism.

A. No, I did not say that, because practically all obesity cases have a normal metabolism.

Q. Have a normal metabolism?

A. Yes, a normal metabolism. Practically all of them. There are certain hypo-thyroid states.

Q. There is a kind of obesity which has an increased metabolism, is there not?

A. I question that. I have seen a lot of so-called increased rates, but when I have gotten careful examinations of them under proper conditions, they have usually turned out normal. As an illustration, I have had a patient who has been reported to me as plus 40 on certain occasions and plus 25, and when we finally got the rate done right and all problems, put the patient in the hospital and let her rest up, we found those rates were normal. These fat people you speak of.

Q. Is it not a fact that myxedema—that is a class of obesity, is it not?

A. It may be associated with obesity, yes.

Q. It is due to defective thyroid glands?

A. Yes.

Q. Is not that a case where you use the thyroid remedy?

A. We use that because of hypo-thyroidism, yes.

Q. Is it not a fact that very few persons have defective thyroid glands?

A. Yes. In fact, most of them have normal rates, as I have stated.

Q. Where they have normal rates, is there any reason why you should not resort to diet and exercise to get rid of this surplus fat?

A. There is no reason why that cannot be used and is used.

Q. And is used?

A. Yes.

Q. Where the rate is normal, that is usually the treatment, is it not?

A. That depends on the individual that is treating. If I may explain, it is for this reason: it is very difficult to establish a continuous weight loss in the patient by diet adjustment unless that patient will weigh his food daily. That is, if the patient is given a definite diet order and he weighs that food daily, that patient can then be given a diet which will not be harmful to the patient and by which he may reduce. As I stated, there are some of them which will not reduce with any degree of consistency where diet measures vary.

Q. Haven't you had in your practice, Doctor, obese patients come to you for whom you did not prescribe thyroid?

A. Yes. There might be people of that type.

Q. What type would that be?

A. If I find a person who has an extensive myocarditis.

Q. What is that?

A. That is extensive destruction of the heart muscles. I perhaps would not use thyroid as fast on a patient of that type.

Q. And the reason for that, Doctor, is that that would destroy more of the heart tissue if you administered thyroid, would it not?

A. No, that would not be the reason, because it does not destroy the heart tissue itself. It would be because we might possibly accelerate the rate of the heart beat and we do not care to take a weak heart and cause it to beat too rapidly.

Q. And in that case it might be dangerous to administer thyroid?

A. Possibly.

Q. Are there not many obese people who are afflicted with just such heart trouble as you have just described.

A. Yes, there are people of that type. I do not know how many.

Q. What other symptoms that you find in a patient would cause you not to administer thyroid?

A. I possibly would not administer thyroid for any patient that would be willing to follow my diet adjustment and get a result. If they did follow my diet adjustment and did not get a result, I would be willing to use thyroid.

Q. If you administered thyroid, would you not make a careful examination of the patient, not only to begin with, but from time to time during the treatment?

A. I have all of my patients, obesity patients, report to me for examination once a week or one every two weeks, as the case depends, irrespective of what treatmnt is being used.

Q. To what kind of an examination do you submit them?

A. I examine all of my patients as to blood pressure, heart and urine examination, and talk with them long enough to see how they have been getting along in the course of time. It requires ordinarily twenty-five minutes time to a patient.

Robert W. Keeton

Q. Now, take such a patient as you have described there with heart trouble as you have described it; would you consider it safe to put that person upon a diet of two grains of thyroid for a period of sixty to ninety days without an examination during that period?

A. Provided it was accomplished by the instructions to "consult your own physician if you want any special advice on any unusual condition."

Q. Now, I am not asking you that.

Mr. Hornibrook: Will you please repeat the question to the witness, Mr. Reporter.

Examiner Averill: The answer is not responsive to the question. The answer is predicated, or the question, rather, is predicated upon the administration of Marmola tablets.

By the Witness:

A. If I were treating a patient, I would not give him any medication without examination.

By Mr. Hornibrook:

Q. And you would not think it safe to give him these two grains a day for the period of ninety days with that heart affliction that you have described.

A. I do not give medication without examination.

Q. You have stated in your testimony your belief that it would be safe for the average person. How about the person who is not an average person.

A. What do you mean by that? Would you be more specific, please?

Q. One that has heart trouble, say.

A. What type of heart trouble do you mean?

Q. Any unusual condition.

A. There are many cases of heart trouble in which —well, there are heart lesions, I will say, in which the patient is in practically as good health as the normal individual and there would be no contra indication in that class of cases.

Q. How about an accelerated heart?

A. It depends upon what that condition is due to. There are many cases of acceleration of the heart. I could not answer that without more specific data.

Q. How would a patient know, following the instructions there on the tablet that you have examined, that it

was time for him to go and see a physician, as suggested there?

A. If that patient has been developing any nervousness or tendency to sweat unusually, or if he finds any excessive action or over-action on the part of the heart or heart consciousness, I think that individual would consider that that is different or out of line.

Q. Do you find any such instructions there to guide the patient?

A. The only thing I find in this book is to "consult your physician if you want advice on any unusual conditions." I would consider that an unusual condition.

Q. Might he not have night sweats from tuberculosis also?

A. Yes, he might have night sweats from tuberculosis. He would probably know it, however.

Q. I want you to tell us any other case where you would term it dangerous to administer two grains of thyroid for a period of ninety days other than the heart trouble that you have just referred to.

A. I did not get that question.

Mr. Hornibrook: Repeat it, please.
(Question read as above recorded.)

A. I would consider it important in any case, with the administration of two grains of thyroid, to give the advice to consult your physician on any unusual condition if the patient were not under the care of a physician. If I were giving thyroid to my patients, I would probably describe to them some of the symptoms such as I have described here, and I would tell them to consult me at the time.

Q. Doctor, I will ask you this, would you give, without an examination and without the patient returning to you for re-examination, that patient a prescription calling for the administering of two grains of thyroid per day for the period of ninety days.

A. I would not give the patient that prescription until I had examined him. I have on two occasions examined patients and have followed the course of those cases, and in both those cases I allowed them to go to Florida with two grains of thyroid to be taken daily and with the instructions that if certain symptoms developed, which I attempted to describe, they should stop it. Otherwise, they might continue it.

Q. You describe to the patient those certain symptoms.

A. Yes.

Q. You did not say, "if any unusual conditions arise," but you described the symptoms.

A. Yes, I described to the patient certain symptoms.

Q. Is it not a fact that the administration of thyroid, two grains a day, for a period of sixty to ninety days to a person afflicted with kidney trouble might be dangerous?

A. It depends upon the type of kidney trouble. It is not given, of course, as a treatment for nephrosis.

Q. The ordinary patient would not know the type of kidney trouble he had, would he?

A. I do not know that he would know that he had kidney trouble.

Q. He would not even know that? And there is a certain type of kidney trouble for which it is dangerous for thyroid remedy to be administered, is not that true?

A. I will say there are types of kidney trouble which are extremely dangerous to the patient, and there are very many simple, harmless remedies that we would not give under that condition. I would not give cathartics for certain types of kidney trouble.

Q. And to those certain types to which you refer you would not give thyroid?

A. I would not give any drug to some of those.

Q. Doctor, would you give thyroid, two grains a day, for a period of sixty to ninety days, in the case of incipient tuberculosis?

A. That is not considered good treatment for tuberculosis.

Q. The ordinary patient would not know he had incipient tuberculosis, would he?

A. Tuberculosis is usually associated with a loss in weight and such a condition is not one which has to be treated for obesity.

Q. But still—

A. And the fact is that tuberculosis is one of the notorious diseases to cause weight loss. Tuberculosis, cancer, hyper-thyroidism and diabetes are our four diseases that cause rapid loss of weight.

Q. But there are obese persons who are tubercular, are there not?

A. They usually have been fattened by staying in a sanitarium. They are not undiagnosed tuberculosis.

Q. What is that?

A. They are not undiagnosed cases of tuberculosis.

Q. Do you maintain that there are no fat people who have tuberculosis?

A. What is that?

Q. Do you claim that there are no fat people who have tuberculosis?

A. No, I do not say that. I say that the average individual who has tuberculosis loses weight, and that when they become fat, it is usually as the result of treatment.

Q. Have you not come in contact, in your practice, with obese persons who have had tuberculosis.

A. Yes, there are a few of those. They do not stay obese long.

Q. But they did not know they had tuberculosis at the time they came to you, did they?

A. No.

Q. Would you prescribe it in the case of diabetes, Doctor?

A. I see no reason for it, unless that diabetes is associated with hyper-thyroidism.

Q. Would you prescribe it in the case of hyper-thyroidism?

A. Which?

Q. Thyroid remedy.

A. It would then depend a great deal on—you mean in hyper-thyroidism complicated with diabetes, or hyper-thyroidism by itself?

Q. By itself.

A. Your question sounds like you say "hypo-thyroidism."

Mr. Cantwell: It is understood that that is hyper-thyroidism.

By Mr. Hornibrook:

Q. Hyper, yes.

A. I would not prescribe it for hyper-thyroidism, no.

Q. What is hyper-thyroidism?

A. We have two clinical types of hyper-thyroidism. We have the exophthalmic goiter described in which the symptoms come on rather suddenly and are associated with tachycardia, sweating, loss of weight, rapid heart beat, and a great many nervous manifestations. This disease frequently goes in cycles. We have another type of hyper thyroidism which is usually due to an adenomatous growth in the thyroid gland. In this case, we have

a tumorous growth and this tumor continues to grow and as it continues to grow, it continues to manufacture thyroid secretion, so there is delivered to the body daily a larger dose than is required by the body and is entirely comparable to the excess thyroid secretion.

Q. So that the taking of more thyroid in the way of a thyroid remedy would not be proper in a case of that kind.

A. In hyper thyroidism, one of the outstanding symptoms is weight loss. We do not make diagnosis of hyper thyroidism in untreated cases, unless there be present weight loss.

Q. Well, do you not find, Doctor, in your practice, that great numbers of women come to you who are not really obese but desire to reduce flesh because of style, they think they would look better, is that not the fact?

A. I really have not found many of those. Every patient I have had come to me for weight reduction has been over the weight for a person of that height.

Q. You know it to be a fact, do you not, that many people who are normal in weight, particularly women, desire to become more slender and do take a treatment to reduce.

A. I cannot say that I know it to be a fact. I have heard it as a matter of gossip.

Q. In cases of that kind, the taking of thyroid remedy would be dangerous, would it not?

A. Not necessarily.

Q. In all cases where the system itself is producing still greater amounts of thyroid than is necessary and proper, it would be improper and dangerous to take a thyroid remedy, is that not a fact?

A. If the patient had a hyper-thyroidism, it would be improper to take thyroid extract. It would first have to be established that the patient had hyper-thyroidism.

Examiner Averill: Doctor, if the patient were suffering from that condition, namely, hyper-thyroidism, would the average individual show a tendency to an increase to flesh, or would it show a tendency to be under the average?

A. They would lose weight. That is a cardinal symptom of hyper thyroidism. It is the outstanding disease which causes weight loss.

(A short recess was here taken, after which the proceeding was resumed as follows.)

By Mr. Hornibrook:

Q. Doctor, do not the authorities which you have read and studied generally warn against the giving of thyroid remedy without a careful physical examination?

A. I have seen no specific instructions to that effect. Usually the medical literature pre-supposes that the patient will be examined, but I have seen no special instructions on that.

Q. Are you familiar with the work on myxedema by C. A. Elwell of Berlin?

A. No, I do not know of it.

Q. It is copied out of "Modern Clinical medicine" under the caption of "Diseases of metabolism and the blood, animal parasite toxicology." Have you read that article?

A. No, I have not read that article.

Q. Doctor, is not this the fact, that under organic therapy, the system becomes decidedly accustomed to the taking of thyroid gland, so that its therapeutic is weakened, so that the dosage must be constantly increased; on the other hand, when you consider the toxic action, the debility and tiring of the heart, the damage to the stomach, etc., it appears that one does not become accustomed to it, that the longer the drug is administered the greater the susceptibility.

Mr. Cantwell: There are about four or five inconsistent sentences in there, your Honor and perhaps four or five questions in one.

Examiner Averill: If the Doctor finds an inconsistency, he can call attention to it and ask to have it divided. If he can answer the question as put, I will ask him to do so; if not, it may be divided.

A. Would you mind reading the first sentence of that, sir?

By Mr. Hornibrook:

Q. Under organic therapy, the system becomes decidedly accustomed to the taking of thyroid glands.

A. That is a specific point. We can discuss that.

Q. Yes.

A. It is true that the taking of thyroid gland in many adults does not increase the metabolic rate. That has been reported. So that a person might take thyroid gland and show no increase in rate. We usually expect if

a person takes thyroid gland and it has an effect on the rate, that it will tend to make that rate accumulate the effect, rather than lose the effect or have a loss of effect. So I say, if it is going to have any effect at all, it would not lose its effect.

Q. Does not the taking of thyroid for a long period, make the system become accustomed to the taking of thyroid?

A. No. If it were, an exophthalmic goiter and hyper thyroidism would cure themselves spontaneously, but they do not do that.

Q. On the other hand, when we consider the toxic action, the debility and tiring of the heart, the damage to the stomach, and so forth, it appears that one does not become accustomed to it.

Q. I would have to answer that by saying that those are matters of clinical opinion. They are not matters which can be subjected to measurement. Some people claim there is not any effect on the heart unless there is an increase in rate. That is one man's opinion. Another man's opinion is different. We have not any way of measuring the effect on the heart muscle, and we have not any way of measuring the effect on the stomach. If the rate is not increased, then we are at a loss, except to ballot on opinions.

Q. Your opinion is that there is an effect on the heart, if it is increased.

A. My opinion is that if we have a change in the metabolic rate, then the heart would share in the excess work. If the rate were not increased, I would not feel that there was any objection to its use.

Q. Is it not a fact that the use of the thyroid gland in the treatment of every case of obesity is to be condemned?

A. I would not agree to that.

Q. In every case of obesity.

A. Of course, there are a lot of cases of obesity where it is valuable.

Q. But I am asking you if it is proper in every case of obesity.

A. One would not use the same drug always. I would not give digitalis in every case of heart lesion I might have. I can only answer it in that way.

Q. You would not give thyroid to every case of obesity, would you?

A. I do not give it to every case of obesity.

Q. Is not this the proper treatment in the administer-

ing of thyroid: thyroid should be used only when strictly indicated and in moderate doses and, moreover, when the patient can be examined frequently, in order that its use may be temporarily discontinued as soon as the heart shows an acceleration of ten beats or more in the sitting position?

A. May I answer that by piece meal, if you will?

Q. Yes.

A. If you will read the first portion to me again.

Q. The first is: thyroid should be used only when strictly indicated.

A. I would answer that by saying that I would like to know what you regard as "indicated." What do you mean by indicated?

Q. Do you consider the use Sajou's Analytical Encyclopedia of Practical Medicine an authority?

A. It is published and considered an authority for many people. It is not our best authority, though. It is very apt to include a lot of statements which are the result of clinical experience and, therefore, matters of opinion.

Q. Is it not a fact, Doctor, that thyroid should only be administered when the patient can be examined frequently, in order that its use may be temporarily discontinued as soon as the heart shows an acceleration of ten beats or more in the sitting position?

A. I examine people frequently when they are under treatment by me. I can say nothing about when people treat themselves as to how often they should apply to me for examination.

Q. Assuming you found a rise of pulse rate above 100 and restlessness in a patient that you were giving thyroid, would you not discontinue it?

A. I would.

Q. Have you found such conditions or similar conditions as that where thyroid was being administered?

A. I found patients who, after taking it for a while were uncomfortable and had some consciousness of heart action. I have these patients discontinue it. I have had them return to it and take it without very much return of the symptoms on a second trial.

Q. You found a rise in temperature?

A. No, a rise in temperature is only a late effect of thyroidism. I found some increase in the pulse rate.

Q. You found some increase in the pulse rate.

A. Yes.

Q. But in those cases you discontinued it.

A. Yes.

Q. Is there not sometimes the effect, Doctor, of thyroid administered to a patient that it produces violent headaches, feeble action of the heart, and sometimes diarrhea, and vomitting.

A. Those symptoms appear when the patient is taking a comparatively large dose.

Q. Is not this the proper treatment: should any of those symptoms that I last mentioned come on, that the complete stoppage of the use of the drug for some days should be brought about?

A. Yes, they should stop it until the effect is worn off.

Q. And when they return to it, the return should be gradual, is not that the fact?

A. Well, it is again a question of dosage. With two grain doses, I think it would be perfectly safe to return to it.

Q. Return to it?

A. Yes.

Q. In some individuals, the two grain dose a day might cause this violent headache, feeble action of the heart and sometimes diarrhea and vomitting?

A. I have never seen it. I have seen it cause headache, but I have never seen feeble action of the heart, diarrhea and vomitting from two grain doses.

Q. But if you had a case where the action of the heart was feeble to begin with, you would not start out with a two grain dose, would you?

A. It is very difficult to measure feebleness of the action of the heart. Sometimes a patient says his heart is feeble acting, when it is simply an emphysemical chest, and you cannot hear good. I think if you are going to use thyroid, two grains is a good dose to use.

Q. But you can diagnose feeble action of the heart, can you not?

A. More by what the patient tells me than anything I can hear by listening.

Q. If the patient told you he had a feeble heart, would you deem it good practice and proper to prescribe two grains a day for from sixty to ninety days without subsequent examination.

A. If a patient told me he had a feeble heart, I would not consider that was much evidence. I would ask him some questions which would lead me to believe whether he had really a feeble heart and, in the second place, assuming he did have a feeble heart and he needed thyroid,

I would give it to him, and I would tell him to continue it until such time that he got some symptoms, or if he could not report to me, to come back to me until such time as I could cure him.

Q. You would describe those symptoms and tell him to report to you as soon as those symptoms become apparent.

A. I would describe those symptoms, as I have told you, as a matter of fact, I had let them go to Florida, under my advice, as I had before told you.

Q. You would describe those symptoms and tell him to report to you as soon as they became manifest?

A. Yes.

Q. Do you ever administer thyroid, Doctor, without prescribing a diet along with it, as part of the treatment?

A. I do not treat patients unless they are willing to follow a diet.

Q. You have examined the table there. Where is it where it speaks about the diet.

A. "Suggestions."

Q. It says here, beginning at the bottom of page 8—

Examiner Averill: Counsel is now referring to the booklet which is enclosed with Commission's Exhibit No. 3.

By Mr. Hornibrook:

Q. "Avoid starches and sweets in excess. Starchy foods include bread and potatoes. Cut down fatty foods. Instead of them eat poultry, game, eggs, lean meat, clear soups, fish, and sea foods. All kinds of fruits and fresh vegetables are good for you. Eat all you want of them, but be sparing of foods with high caloric content like sugar, cereals and fat."

Is that the kind of a diet that you would prescribe, Doctor?

A. Yes, sir. The only difference is that I put it in terms of grams. I consider the high protein as essential and important thing in diet. Lots of meat, lean meat, lots of eggs, skim milk, a moderate amount of the higher starches.

Q. So when you are treating obesity, you reduce it to specific quantities.

A. Yes, I ask them to buy a scale.

Q. You would not think of prescribing in such general terms as that a diet for an obese person, would you?

A. Well, that is perfectly acceptable. The only objection I would have to prescribing it in those terms is that I would be afraid that they might not get as good success as I would like. I have a friend to whom I have given my diet suggestions and he tells me that a qualitative diet of this kind he has been able to reduce a great many patients without the use of scales. I simply cannot afford to make a failure in treating an obesity case and I will not take a chance by not using quantitative methods.

Q. You always do?

A. Yes. I always do. Even with our dispensary patients. I tell them to go elsewhere if they do not take the matter seriously enough to buy scales.

Q. You have examined the formula for Marmola, have you, Doctor?

A. Yes.

Q. How many kinds of physics are there set out in that formula?

A. Well, there is cascara, that is one, and phenolphthalein is another. Those are the main physics in there.

Q. Is that formula a scientific formula, Doctor?

A. Yes, because it is based on knowledge that cathartics or laxatives do abstract water from the system, and because from my experience thyroid gland does stimulate the metabolism in certain cases, and in other cases it causes water loss without stimulation of the metabolism.

Q. How many drugs are there there that have no effect upon the human body in cases of obesity.

A. I do not know that any of these drugs outside of cascara and phenolphthalein and thyroid would have very much effect.

Q. The rest of them are inert so far as the treatment of obesity is concerned?

A. That would be my opinion.

Q. And you would still call that a scientific formula.

A. We frequently place into formulae other things to make them taste good, palatable, preservatives, to make them satisfactory and pleasing drugs to the patient. This is important in taking care of the patient, although scientific accuracy may not demand it.

Q. Is this what you wish to say, Doctor, that there are some remedies named in that formula of which science approves in the treatment of some cases of obesity?

A. Read that question please.

Mr. Hornibrook: Read it.

(Question read as above recorded.)

A. Yes, that is correct.

By Mr. Hornibrook:

Q. Now, I believe you stated there are two major physics or laxatives in that formula.

A. Yes.

Q. I will ask you this question: assuming that a person was to take those tablets for a period of sixty to ninety days as directed, would that be apt to create the laxative habit in a person?

A. It might.

Q. It might, if taken for that length of time cause irritation of the bowels, might it not?

A. It might in some cases.

Mr. Hornibrook: I think that is all.

Mr. Cantwell: That is all, Doctor, thank you.

Examiner Averill: Very much obliged, Doctor.

(Witness excused.)

Examiner Averill: We will recess at this time until 2:00 o'clock.

Whereupon at 12:30 a recess was had until 2:00 P. M., October 25, 1928.

Before The Federal Trade Commission.

In the Matter of Raladam Company. } Docket No. 1496.

Chicago, Illinois, October 25, 1928.

Met pursuant to adjournment, 2:00 o'clock P. M.

Before:

Edward M. Averill, Examiner.

Appearances:

Edward J. Hornibrook, for the Federal Trade Commission, Washington, D. C.

R. M. Connors, 560 Equity Building, Detroit, Michigan; Rockwell Gust, 2214 First National Bank Building, Detroit, Michigan, and Robert E. Cantwell, Jr., 1105 Hartford Building, Chicago, Illinois, for the respondent.

F. LEE STONE, was thereupon called as a witness, and having been duly sworn, testified as follows:

F. Lee Stone

Direct Examination by Mr. Cantwell:

Q. Will you state your name.
A. F. Lee Stone.
Q. Where do you reside?
A. Chicago.
Q. What address?
A. 559 Aldine Avenue.
Q. What is your profession?
A. I am a practicing physician here in Chicago.
Q. Where are your offices?
A. 25 East Washington Street.
Q. Where did you receive your education?
A. Here in Chicago with the University of Illinois, that is, the Medical Department, the University of Illinois, graduated there in 1910.
Q. And when were you licensed to practice medicine?
A. I was licensed to practice medicine in 1910 in the State of Illinois.
Q. What teaching positions have you held in the past?
A. I was instructor in pathology in the University of Illinois 1910 and 1911. I was professor of Pediatrics at Creighton, Omaha, Nebraska. I practiced in Nebraska two years and was Professor of Pediatrics at Creighton. I came back to Chicago in 1914 and was then placed on the faculty of the University of Illinois as instructor in Gynecology and obstetrics, also general instructor in pathology, pathological obstetrics. I have been an assistant in Gynecology at the University of Illinois and have been an associate in Gynecology at the University of Illinois and am now Assistant Professor of Gynecology at the University of Illinois and have been for the past three years.
Q. Where was your interne work, Doctor?
A. I served an interneship in Cook County Hospital, 1910 to 1912.
Q. And have you had any military experience?
A. I served in the base hospital 36 from August, 1917, going over to France in October, 1917, and I remained over there with the American Expeditionary Forces and the British Expeditionary Forces until the spring of 1919, spending eighteen months in France.
Q. And what was your rank when you left the army?
A. I left the army as captain.
Q. And while you were in France were you in the base hospital?

A. Base hospital and ambulance company, but largely base hospital.

Q. Connected with medical work?

A. Medical unit, yes.

Q. What are your hospital connections, doctor?

A. I am a testing gynecologist at the Research Hospital of the University of Illinois, testing gynecologist at the Chicago Polyclinic and Henrotin Hospital, and also a consultant on the Chicago State Hospital staff.

Q. What medical scientific societies are you a member of?

A. I am a fellow of the American Medical Association and I belong to the Chicago Medical Society and the Illinois State.

Q. By that you mean the Illinois State Medical Society?

A. Yes, and I also belong to the Chicago Pathological Society and to the Research Club of the University of Illinois and also to the Chicago Gynecology Society.

Q. Have you ever written any papers that have to do with the practice of medicine?

A. Yes, from time to time I have written on certain subjects, largely along gynecological and obstetric lines. In 1912 I wrote a report on a case of Cretinism, which appeared in the Nebraska State Medical Journal in 1913. I have written also a lot of which have been published in the American Journal of Obstetrics and Gynecology, and I wrote an article on Lip Iodol as a diagnostic aid in Gynecology. I have also written on urinary incompinence in women and have also handled the seminar work at the University of Illinois.

Q. You are in the general practice of medicine and surgery in Chicago?

A. Yes, I practice general medicine and gynecology and obstetrics along with surgery.

Q. And have you ever had any experience in obesity?

A. I have had considerable experience in obesity, obesity associated with gynecology.

Q. Have you had any experience in your practice of medicine with thyroid medication?

A. Yes, I have used it considerably in the form of dessicated thyroid and in combination with other drugs.

Q. And have you, in your practice of medicine, administered thyroid to patients?

A. Yes.

Q. Now, from your training and experience and

knowledge, is there a relationship between the thyroid and other glands of internal secretion?

A. Yes, there seems to be a very definite relationship between those glands.

Q. Will you tell us what is meant by the United States Pharmacopoeia dry thyroid?

A. Desiccated thyroid as put forth in the U. S. Pharmacopoeia is substance taken from the thyroid gland of food animals, that is, animals used by man for food purposes. The glands are separated from the fat tissue and dried, dessicated, and the dried glands are approximately equal to five grains of the fresh glands, and the iodine content of these glands, according to the U. S. Pharmacopoeia, should run not less that .17 or more than .23 per cent, the average being .2 per cent of iodine per grain. The powdered, dessicated thyroid is standardized under those headings.

Q. And what is the United States Pharmacopoeia dose of dry thyroid?

A. One grain.

Q. And what is the United States Pharmacopoeia dose of extract of cascara?

A. Five grains.

Q. And can we have the record show that we say U. S. P. we mean United States Pharmacopoeia?

Examiner Averill: Yes.

By Mr. Cantwell:

Q. What is the United States Pharmacopoeia dose of phenophtalein?

A. The United States Pharmacopoeia dose is one grain.

Q. What is the use of and what are the indications of cascara?

A. Cascara is a mildly efficient laxative. It acts largely on the colon and is used widely in cases of habitual constipation and still has a tendency not to cause constipation without dependence upon its use.

Q. Will you explain how it functions when taken into the body in persons that need it?

A. It acts as a stimulant. It increases the rythmic contractions of the intestines and forces onward the bolus.

Q. What is the use and what are the indications for phenophtalein?

A. Phenophtalein is a laxative and acts largely on the lower colon and also on the rectum.

Q. Doctor, you are familiar, you said, with thyroid medication.

A. Yes.

Q. What are the clinical uses for thyroid?

A. Thyroid is indicated in several conditions, firstly, deficiency conditions such as Cretinism, Myxedema, Hypothyroidism. In certain endocrine conditions, such as Dysmenorrhoea, also in infantilism. It is also sometimes used in certain skin conditions, such as Psoraisis. It is also used in certain kidney conditions, such as nephrosis, and it is also used in combination with other drugs in the treatment of obesity, and has been used at times in the treatment of cardiac conditions.

Q. You said cardiac conditions, you mean heart conditions.

A. Yes, heart conditions.

Q. Is thyroid in U. S. Pharmacopoeia, or less than U. S. Pharmacopoeia poses, habit forming?

A. No, I would say it is not habit-forming.

Q. Is thyroid in U. S. Pharmacopoeia or less than U. S. Pharmacopoeia doses toxic?

A. No, it is not in U. S. Pharmacopoeia doses.

Q. Is it lethal?

A. No.

Q. You say that the U. S. Pharmacopoeia dose is one grain.

A. One grain.

Q. How many times a day?

A. When we give a dose, we consider it means two, three, or four times a day, and I would say that thyroid given in one grain doses, two, three or four times a day would not be considered lethal or toxic.

Q. Or habit forming?

A. Or habit forming.

Q. Now, doctor, will you tell us what you mean by idiosyncrasy?

A. It is hyper susceptibility of an individual to anything that may be taken in or anything in which they may come in contact. For instance, a person may come in contact through respiratory contact or direct contact with hay fever or pollen or certain weeds, poison ivy, for instance, which will affect certain persons and will not affect others. These persons affected by it, by poison ivy, for instance, have an idiosyncrasy, and while the pollens are perhaps better examples of idiosyncrasy, other drugs

more likely proteins of which there is a long list—I think in the National Formula there is a list of over 300 proteins, which they have isolated extracts of in order to use in determining whether or not a person has a susceptibility to these certain things. These conditions, these materials, these proteins, cause severe symptoms to develop in an individual who is hyper susceptible or has an idiosyncrasy to those particular things.

Q. Can there be an idiosyncrasy to a substance which is normally present and continuously produced in the body?

A. No.

Q. Is thyroid such a substance?

A. Yes.

Q. Doctor, what are the clinical effects of thyroid medication?

A. The clinical effects of thyroid medication are to increase oxidation, and in that way to stimulate the entire economy of the individual. It acts uniformly, but, of course, the individual responds differently, according to the conditions present.

Q. Doctor, will you tell us what you know about basal metabolism.

A. Basal metabolism, the basal metabolic rate is that rate of oxidation and energy loss which occurs when the body is producing heat at the lowest point. This varies according to age and according to sex. It is greater than in the males than in the females. It is greater in youth than in the adult age. This oxygen consumption may be measured by an instrument of precision of which there are a number of different makes on the market. It is gauged, that is, when the subject is placed under the proper conditions such as mental and physical rest for a period of not less than thirty minutes and is free from the alimentary food or absorbable food in the intestinal tract, the base is considered zero for the group. Then the test is determined from this particular group, the sex, the surface area, or the weight, and judged whether it is then a plus or a minus for that particular group.

There are many conditions which will cause a variation in the metabolic rate. We have a great many situations, and it is sometimes very difficult to get an individual properly relaxed in order to run a proper basal rate or obtain a basal rate. For instance, at times I have seen an individual, after apparently careful preparation, run an extremely high rate, as high as plus 90. Knowing the patient and having examined the patient, I considered

there must have been some emotional, some psychic condition which caused this rate to be increased. At a later date, I found the patient's rate when she was under a better condition to be a minus 15 instead of a plus 90. Other conditions that may affect the basal rate are sudden exertion, even movement which on the table, hot baths, cold plunges, eating a small amount perhaps, drinking just a cup of coffee with milk and sugar in it may raise the basal rate 5 or 10 or 15 percent. The intake of food in large amount will raise it in proportionally larger percentage. Sexual relationship, pregnancy, will increase the rate. Emotional disturbances, psychic conditions, and there are a number of other conditions that would cause an increase in an otherwise normal rate.

Q. Is the measurement of the basal metabolic rate necessary before thyroid medication?

A. No, I would say not.

Q. May thyroid medication be properly given in cases where the basal metabolic rate is normal?

A. Yes.

Q. What chemical changes take place in the body parallel with the raising of the basal metabolic rate from taking thyroid?

A. We have an oxidization of the glycogen content of the blood. After this is lowered, a reduction takes place in the fats and lastly, in the proteins, which are converted into glycogen before they are utilized. This protein is a serum protein rather than a tissue protein.

Q. As a rule, what is the basal metabolic rate of fat or obese persons who are otherwise healthy, except for the obesity?

A. Normal from minus 10 to plus 10.

Q. If a person has a basal metabolic rate ten points above normal, is that a symptom of any injury going on in that person's body?

A. I would say not.

Q. What is the line of demarkation of the increase of the basal metabolic rate which you regard as having a pathological significance?

A. A plus rate of 25 would be considered as showing evidence of an increase.

Q. And how much thyroid medication must a normally average person take to increase the basal metabolic rate to plus 25?

A. It takes about 40 grains.

Q. You mean, when you say 40 grains, do you mean in one dose?

A. Yes, 40 grains in one dose to raise it to that point of plus 25.

Q. In other words, you mean to take two grains for twenty days.

A. No, that would not have the same effect. It would not be the equivalent of 40 grains at one time.

Q. What are the various forms of obesity?

A. Obesity is usually divided under the headings of indogenous and exogenous. The exogenous should be considered as those cases that are, perhaps, alimentary in character, the Gormandizer, the man who overeats, the lazy person, and the alcoholic obesity. Under the indogenous we have the various hypo states, such as hypo pitituitary conditions, hypo ovarianism and hypo thyroid.

Q. Now, what is the treatment for obesity in general, doctor?

A. The treatment for obesity in general should be taken up under perhaps three or four headings. The intake should be considered.

Q. The intake of what?

A. The intake of food should be regulated and reduced. Certainly, the intake of fats and carbo-hydrates should be reduced. The emunctories should be eliminated. There should be a urinary output, the skin output and the bowels and the excretion from the bowels should be stimulated. Those exercises rather than being diminished should be increased, for by the increase of exercise, there is an increase in oxidation and, fourthly, thyroid in combination may be given to advantage.

Q. Doctor, do you use thyroid in conjunction with other things in the treatment of obesity in your own private practice, and if so, what is your average dose?

A. I use thyroid, yes, and I would say my average dose is one grain, that is giving it three or four or even five times a day, so that the patient may be getting as much as five grains a day.

Q. Would it be good practice to give a laxative in less than U. S. Pharmacopoeia doses along with thyroid medication in the treatment of obesity?

A. Yes, it would because I believe that as long as there is increased oxidation of the materials in the body, there is an increase in the urinary output and there also should be an increase in the output by the intestinal tract.

Q. You have examined the instruction booklet, Com-

mission's Exhibit 3, which is enclosed with every package of Marmola.

A. Yes, I have seen it.

Q. And you have also examined the prescription of Marmola.

A. I have.

Q. Doctor, in your opinion, will the taking of this remedy, Commission's Exhibit 3, known as Marmola Tablets, according to the directions, instructions, and advice be effective to reduce obesity?

A. Yes, it would be.

Q. Doctor, in your opinion, will the taking of this remedy, Marmola tablets, according to these instructions, directions and advice be safe?

A. Yes.

Q. Doctor, in your opinion, will the taking of this remedy, known as Marmola tablets, Commission's Exhibit 3, according to the directions and instructions and advice act with uniformity on the users thereof.

A. Yes, I think that it would.

Q. Can this remedy, known as Marmola tablets be taken safely according to instructions, directions and advice without previous consultation with a doctor.

A. Yes, it can.

Q. Doctor, in your opinion, would this remedy, Marmola tablets, if taken according to the directions, instructions and advice, contained in the booklet, constitute a scientific remedy for obesity?

A. Yes, it has a scientific foundation.

Q. Doctor, in your opinion, would you say that the formula used in the prescription of Marmola tablets is based upon scientific research and accuracy, and if so, what are the reasons for your opinion?

A. The action and use of the thyroid extract has been rather definitely worked out so that we know it will increase the oxidation in the patient. The combination with laxatives noted herein certainly would be a beneficial combination, and I would say that it would act in a beneficial manner and that the combination is a scientific preparation.

Q. Would you say that this prescription of thyroid balanced with laxatives and accompanied with the advice, instructions and directions is a practical remedy for the average case of obesity?

A. It is a practical remedy, yes.

Q. Doctor, what is meant by the term "constipation"?

F. Lee Stone

A. Constipation is that state in an individual in which the bowel action is delayed to such an extent that it becomes other than normal.

Q. Doctor, what is meant by the term "laxative habit"?

A. The term "laxative habit," as I understand it, is a habit which is acquired from the necessity of taking something, be it what it may, to relieve constipation.

Q. Will the taking of a quarter of a grain of cascara and a quarter of a grain of phenophtalein four times a day for a period of sixty to ninety days cause a laxative habit in persons who have not a pre-existing constipation or laxative habit?

A. No, it would not.

Q. Doctor, what would be the effect on the bowels after stopping taking quarter of a grain of cascara and quarter of a grain of phenophtalein four times a day for from sixty to ninety days on a person otherwise healthy except for his obesity.

A. Following the discontinuation of the remedy, I believe that after discontinuing the remedy that there might be a period of a few days wherein there might be some difficulty in getting the bowels to become restored to normal, but if there has been no previous constipation, there is no reason to assume that constipation would occur. The chances are that normal bowel action would be restored after a few days. It might take three or four or five days to restore that to normal.

Q. Doctor, will you define hyperthyroidism.

A. Hyperthyroidism is a condition where there is an over-abundance of the thyroid gland substance in the system. It is manifested by certain symptoms, a rapid heart, especially upon exertion, and possibly after or upon the intake of a large amount of protein, and we may have an increase of ½ to 1 per cent in temperature. We will have an increase in the basal metabolic rate and I would say, in mild cases, his basal rate would run plus 25 to plus 40 and a moderate case would be a case running from plus 40 to plus 60 and a severe case would be over that, anywhere from 60 to 100 or even higher. There would be an increase in the secretions. The urinary output would be increased. There would be an increase in the skin secretions and sweat would be increased. There would possibly be some increase in bowel action, especially on the ingestion of a large amount of proteins. There would be some disturbance of the menstruation, possibly the men-

strual period might be prolonged or might be more frequent than normal. The patient would be alert mentally. There possibly would be some sleeplessness and even on waking, the patient would be alert. There would be a general stimulation of all the muscular parts of the body, which would be noticed, possibly without any appreciable fatigue.

Q. Would half a grain of thyroid four times a day cause the patient to have hyperthyroidism.

A. Two grains a day? No.

Q. Would a person with hyperthyroidism be an obese person.

A. No, a person with hyperthyroidism because of the increase in oxidation would tend to lose weight and would tend to be other than obese.

Q. With a person with hyperthyroidism be apt to a remedy for obesity?

Mr. Hornibrook: I object. That is calling for a conclusion.

Mr. Cantwell: I will withdraw that question.

By Mr. Cantwell:

Q. Would an obese person, otherwise healthy, taking half a grain of thyroid four times a day, reduce his obesity before any signs of hyperthyroidism would appear?

A. A person taking half a grain four times a day reduce his obesity? Yes, I believe so.

Q. Would an obese person, Doctor, otherwise healthy, taking half a grain of thyroid four times a day reduce his obesity before any muscular tissues would become oxidized?

A. Yes, the muscular tissue is the last to be affected.

Q. Doctor, what is the therapeutic dose of assayed U. S. Pharmacopoeia dessicated thyroid?

A. As given in the U. S. Pharmacopoeia it is one grain. The range may be from a half grain or even a quarter of a grain up to five grains a day, and in certain cases it has been given in very much higher dosage, 15 to 20 grains.

Q. Doctor, how much of the dessicated thyroid would be necessary to raise the basal metabolic rate to plus 25, as far as you can estimate it.

A. I would say about forty grains.

Q. How much dessicated thyroid would be necessary to raise the basal metabolic rate to plus ten?

F. Lee Stone

A. That, in so far as we can determine, would be about 16 grains of thyroid, dessicated thyroid.

Q. Now, a two grain dose would raise the basal metabolic rate how much?

A. Figuring on that previous basis, two grains would raise the basal metabolic rate 1.2 per cent.

Q. And half a grain dose would raise the basal metabolic rate how much?

A. .3 per cent.

Q. Now you have said, Doctor, that the basal metabolic rate must be plus 25 or more for you to attach significance to it as being pathalogical, is that true?

A. Yes.

Q. Doctor, how large a dose would injure anyone?

A. From 15 to 40 grains might, I would say, injure anyone.

Q. Well, how large a dose would injure anybody?

A. It is rather difficult to say how large a dose. Certainly some persons can stand a great deal more than others, and it might be necessary to give 40 grains, or perhaps it could be noticed with 15 grains.

Q. Doctor, any injurious symptoms in an individual from taking too much thyrcid would be temporary, would they not?

A. Yes, they would tend to be relieved when the medicament is stopped.

Q. Doctor, do you know from your knowledge or experience, of any large groups of persons who take doses of thyroid as large or larger than two grains a day for a period of months without injurious results?

A. I have read of Kitchen's work referred to. I also recall an article by Epstein in the Journal of the Medical Association giving large doses of dessicated thyroid over a long period of time in certain types of Pephrosis, in counter distinction to Nephritis, involving the tubules of the kidneys, and in this case, probably with an associated hypothyroid state.

In my practice, I have in several cases given as much as three grains and four grains a day over a long period of time without any deleterious effects.

Q. Doctor, would half a grain of thyroid, taken four times daily, in the combination prescribed in the Marmola booklet and under the instructions and directions of the booklet produce toxic symptoms in the average obese person, otherwise healthy except for his obesity?

A. No.

Q. How small a dose of thyroid for obese persons

otherwise healthy except for their obesity might cause unfavorable symptoms in a substantial portion of the people who took it?

A. It would have a range from 15 to 20 to 30 grains, I would say.

Q. Doctor, it has been stated at this hearing that a person say over sixty years of age, should not have thyroid administered to him. Do you agree with that statement, and what are your reasons therefore?

A. No, I believe that because a man has reached the age of 60 that he should not necessarily be condemned, because he may, at 60, be in fairly normal condition otherwise. If he happens have an obesity or any other condition that he may be taking thyroid for, I see no reason to hesitate to give thyroid, merely because he is of the age of 60.

Q. Doctor, it has been stated at this hearing that with a person affected with kidney trouble, thyroid could not be administered. Do you agree in this opinion, and if so, what are your reasons?

A. I don't believe that it should be condemned in kidney conditions. It certainly is a valuable remedy in many kidney conditions, especially those that are associated with certain types of kidney condition, associated with Edemas.

Q. Doctor, it has been stated in this hearing that a person with heart lesion should never take thyroid. Do you agree in that opinion, and if so, what are your reasons?

A. I do not. I believe that thyroid may be given in heart conditions without causing any deleterious effect.

Q. Doctor, you have seen and have had occasion to read the prescription of Marmola tablets, and you have read the booklet of instructions and advice contained in the package of Marmola, Commission's Exhibit 3. Is that right?

A. Yes, I have.

Q. Would you say, Doctor, that Marmola tablets are toxic in the treatment of obesity?

A. No, I believe they are not toxic in the treatment of obesity.

Q. Would you say that this remedy known as Marmola tablets can be taken safely according to directions, instructions and advice without previous consulation with a doctor?

A. Yes.

Q. In your opinion, is this remedy, Marmola tablets,

if taken according to the instructions, directions and advice, contained in the booklet, a scientific treatment for obesity?

A. Yes.

Q. Doctor, in your opinion, would you say that this prescription of thyroid combined with laxatives and accompanied with the instructions above mentioned in the booklet is a practical or a valuable remedy for the average case of obesity?

A. Yes, it is a practical remedy for obesity.

Q. Doctor, would a half a grain of thyroid, taken four times daily, in the combination above described and at the instruction and direction and advice contained in the booklet produce toxic symptoms in the average obese person otherwise healthy except for his obesity?

A. No.

Mr. Cantwell: You may cross-examine.

Cross-examination by Mr. Hornibrook:

Q. Doctor, you do not hold yourself out as a specialist in metabolism, do you?

A. No, I am a general practitioner and do gynecology and obstetrics and I see quite a few cases of obesity in my gynecological work and treat quite a few cases. I have had quite a number of cases.

Q. Is it not a fact that your name appears in the American Medical Directory as a specialist in gynecology and obstetrics.

A. Yes.

Q. And those are your specialties.

A. Those two along with my general practice. That classification is not limited to gynecology and obstetrics. I have not an asterisk to my name. It is simply that I tend to lean to gynecology and obstetrics, but I do not limit myself to gynecology and obstetrics.

Q. You stated in your direct examination that Marmola was a scientific combination, I believe.

A. Well, it is based on scientific work. The work on thyroid certainly has been carried on very extensively in a scientific manner by many workers in the field, and it seems to me that a combination which includes a mild laxative such as this does, would come under that heading.

Q. You know that there is a drug there commonly called Poke Root?

A. Yes, but I believe that the active principles of Marmola tablets—

Q. Please answer my question. I do not care for explanations. Just answer my question. You noticed that, didn't you?

A. Yes, Phytolaca.

Q. And you also noticed the extract of Bladderwrack?

A. Yes.

Q. Is there any scientific basis for the use of these two drugs?

A. They are included in this combination. I believe they have been at times thought to have been valuable in certain groups of practitioners in the treatment of obesity, such as the homeopaths. I believe they have considered that these two drugs are of value in the treatment of obesity.

Q. That was quite a number of years ago, was it not, Doctor?

A. Yes, personally I have had no experience with either one.

Q. These drugs are not regarded as scientific now are they, the use of them?

A. I have no knowledge of them, no working knowledge of either one.

Q. It is not used by your school of medicine at all?

A. I would not say.

Q. As a treatment for obesity.

A. I would not say that it is not used, but I have no working knowledge of it, of either one.

Q. Is it not a fact that no physicians can truthfully state that thyroid given according to the U. S. Pharmacopoeia dosage is not toxic unless he knows the condition of the patient.

A. It seems to me that if this is given according to instructions, the patient will be free from harm.

Q. Now, supposing that the patient is a sufferer from hyper-thyroidism, might that patient be easily poisoned by the administration of thyroid in such a dosage?

A. In my practice, I would not give hyper-thyroid—

Q. I am not asking you what your practice is. I am asking you what the fact is.

A. Well, if it were given to a hyper-thyroid patient, it might increase the symptoms to some extent.

Q. And it might result in toxic poisoning, might it not?

A. Hardly, if given in a U. S. Pharmacopoeia dose or a sub-U. S. Pharmacopoeia dose.

Q. Assume that two grains a day are given for a period of sixty to ninety days to a patient of that kind.

A. When the thyroid extract is given to a patient for that period of time, you get a certain amount of reaction and there might be some deleterious effect.

Q. As a matter of fact, in a case of hyper-thyroidism, it might be dangerous.

A. Yes. But the dose is rather small, a dose of two grains is rather small.

Q. For a period of sixty to ninety days.

A. There might be some deleterious effect, as I said before.

Q. Doctor, how many patients have you treated for obesity?

A. I would say twenty-five or thirty.

Q. In a period of how many years?

A. A period of eight years.

Q. How do you treat them? Do you always give them thyroid?

A. No, not necessarily. I first examine them to see if there is any indication.

Q. Indication of what?

A. Any indication that would point out any conditions present that you would not want to give anything but diet.

Q. Just what condition would you find there and have you found which would prevent you from the giving of thyroid.

A. In this one case that I had recently, where I found the basal metabolic rate to be plus 90, I realized there was not a condition present. The condition present did not warrant having a plus 90 rate, and I realized that there must be psychic condition present which necessitated this rate, knowing that there was nothing wrong with the apparatus. So, on taking it later, I found she had a sub-rate, rather than a plus rate. The rate was sub, a minus 15, and in making the examination, I wanted to be sure that this individual was all right, and this is done in all cases that one sees in the office.

Q. Did you give the patient thyroid?

A. I have started the patient on thyroid, along with the diet regime.

Q. How could the patient herself tell that condition?

A. That she had a plus rate?

Q. Yes.

A. Well, apparently it was not a plus rate.

Q. How could she tell that it was a minus rate?

A. She did not know that she had a plus or a minus rate.

Q. The truth of the matter is that the patient does not know anything about that.

A. Except for her obesity, that is the reason for her coming to me.

Q. And if she had a plus rate—if I understand your testimony, a plus rate of 25 or more, you would not give her thyroid, would you?

A. 25 or more, we would consider her a hyper.

Q. And you would not give her thyroid?

A. No.

Q. And she has no means of telling when she comes to you what the rate is.

A. No.

Q. You have some delicate instrument—she knows nothing of it. But when you found the rate plus 25, you would not give the thyroid.

A. No, not if the rate was plus 25.

Q. And the reason for that is that you think there is some danger in connection with the administration of thyroid, isn't there?

A. If the rate is plus 25, the question would be whether she was obese. The chances are if she had a rate that high, she would not be obese.

Q. But she might be.

A. You do not ordinarily see obese persons, they do not ordinarily have, the average case certainly would not have a plus 25.

Q. But we are talking about an unusual case now. You have just testified about one that was obese and had a plus rate of something more than 25.

A. Yes, but I said it was a plus 90, and that was probably not a true rate, and I later determined she was a minus rate instead of a plus. That was one of the possible sources of error in taking the basal rate.

Q. And so that even with machines you cannot tell entirely whether or not you ought to administer this thyroid?

A. I would not use the machine alone. I would have the clinical evidence also, and if there is no clinical evidence for a plus 90, I certainly would want to retake the basal rate.

Q. You would take the basal rate and make a thor-

ough examination of the patient physically before you administered thyroid in any quantity?

A. Yes, and in the practice of medicine.

Q. And if you found a person with a rapid heart, you would not give thyroid at all, would you?

A. If it was a rapidity from exertion, that would be one thing, if there was no reason for the rapidity, that would be another.

Q. If there was no reason for the rapidity, no apparent reason for the rapidity, you would not give thyroid, would you?

A. No, not necessarily.

Q. Why wouldn't you?

A. Because she has a rapid rate and I would determine why the rate was rapid.

Q. And if you could not determine why the rate was rapid, you would not give the thyroid?

A. That would not be my first idea, no. I certainly would not give her thyroid merely because she came in to me for obesity.

Q. You would not give thyroid to anybody would you, unless—say two grains a day for a period of sixty or ninety days unless you required them to come back. In the first instance, you would subject them to a most careful kind of physical examination.

A. Yes.

Q. And you would make this test?

A. Yes. I would require the basal metabolic test.

Q. And after that test and you had prescribed thyroid, you would not prescribe two grains a day for a period of sixty to ninety days without requiring the patient to come back for re-examination from time to time, would you?

A. I would want the patient to come back at least once a week, I would want to keep track of the patient.

Q. Now, doctor, you said that in certain cases of kidney trouble it was beneficial. Are there not other cases of kidney trouble where the administration of thyroid is detrimental?

A. Well, that is possible, there might be some conditions where you would not want to give it.

Q. What would those conditions be?

A. The kidney involved along with an arterial tree.

Q. Would you give it in cases of pregnancy?

A. Thyroid? I have given it. I have given it in certain cases of vomitting in pregnancy and have got

remarkable results, especially in combination with other things.

Q. What other things?

A. In combination with other gland substances, ovarine extract with thyroid. There seems to be an intimate relation between the two, some increase in the action of either one of them.

Q. Assuming that a person was an obese person and also pregnant, would you give thyroid in that case?

A. A person that is pregnant, we would take care of the pregnancy first and would not worry about their obesity.

Q. You would not give it to a pregnant person?

A. Not for obesity, no.

Q. Now, Doctor, you have testified, as I understand it, that an average person, can take two grains of Marmola for a period of sixty to ninety days without danger of toxic poisoning.

Mr. Cantwell: That is objected to. That is not what he testified to, Mr. Hornibrook. It was two grains of thyroid a day.

Q. Well, two grains of thyroid, put it that way, for a period of sixty to ninety days. How about an unhealthy person, not an average person, a person who is unhealthy. Would there be danger of toxic poisoning?

A. What do you mean by unhealthy?

Q. Take such a person as afflicted with kidney trouble, about which you have just testified.

A. Would I give that person two grains? No, I testified I would not.

Q. Would there not be danger of toxic poisoning if a patient was given two grains a day for a period of sixty to ninety days?

A. Well, I would not give it. That is my reaction to that.

Q. Is it not your general practice in treating obesity, to first try a diet?

A. Yes, I like to try a diet.

Q. And exercise?

A. And exercise.

Q. And in prescribing that diet, do you prescribe the amount of diet, as well as the different varieties?

A. I usually tell the individual to make a general reduction and to especially watch the fats and carbohydrates and perhaps increasing the proteins, but I do not require that they weigh the substances that they are using.

F. Lee Stone

Q. The average person does not know what are the proteins and other things, so you have to tell them, do you not?

A. I usually explain that part of it, yes.

Q. Don't you tell the quantities he should take?

A. I tell him to cut down materially on his fats and, of course, the patients knows what fats are, butter and creams and the fatty part of meats, fatty meats particularly should be reduced, and the carbo-hydrates I explain that that is all white things, including white breads and sugar and starches, such as potatoes. Vegetables are small in carbo-hydrate content and some of them are largely protein, so I specify certain vegetables they may have in abundance, and others that they should take more sparingly.

Q. In what instances do you use the thyroid remedy for obesity?

A. I often use that in conjunction with this where we get no results from the straight diet. I have under my care now one particular case where I have put the patient on a very strict diet, not weighing the materials, but watching all these things as I just related, and immediately upon the addition of the thyroid, he began to lose weight.

Q. That is an exceptional case, is it not?

A. No, I would say not.

Q. With you it is an exception?

A. No. You usually can handle an increase in weight, largely you can handle an obese person on a diet.

Q. And if you find that the exercise or diet does not reduce, then you subject the patient to a most careful examination before you prescribe the thyroid remedy.

A. Yes, I do.

Q. Now, you have examined the little booklet there.

A. Yes I have.

Q. Do you find any recommendation there that a person taking Marmola tablets should use more proteins than usual?

A. Well, I don't believe it is specified under the heading of proteins. I think it is just the diet reduction.

Q. Is it not a fact, Doctor, that a person taking thyroid should take more proteins than usual?

A. Should take more proteins?

Q. Yes.

A. Well, if they are taking thyroid, they should not

necessarily take more proteins. They can take more proteins. They can utilize more proteins and utilize more fats and carbo-hydrates, but if they want to get a reduction, they must reduce fats and carbo-hydrates, whereas proteins will not affect their weight so much.

Q. Isn't it good practice to advise a person to take more proteins during the treatment with thyroid?

A. I would do it.

Q. You spoke, Doctor, of Kitchen's experiments and also the Epstein experiments. The Kitchen experimentation was conducted upon boys who had some swelling of the neck, was it not?

A. Yes, some thyroid—

Q. Did the experimentation or the report of it which you read state whether or not those boys in all other respects were healthy, normal boys.

A. Yes, but it increased their general growth.

Q. But they were to begin with healthy, normal boys.

A. Yes, with the exception of this enlargement of the neck.

Q. Now, could a person with an enlargement of the neck or an enlarged thyroid gland take more thyroid without an injurious effect than a normal person or a sub-normal in that regard?

A. Certain of them can, yes.

Q. The fact that it is replacing—

A. I prescribed it oftentimes at puberty in girls.

Q. So that a person whose thyroid glands are not functioning could take these large doses of thyroid, while a person whose glands are functioning properly might find it injurious, is that a fact?

A. These experiments are carried out in the cases of children, not particularly because of their obesity, so that I don't think the parallel is quite fair.

Q. Is it not true as a general proposition that a person who has defective thyroid glands can take more of the thyroid remedy than those whose thyroid glands are normal?

A. It is a specific. Where there is a condition of hypo-thyroidism, it is a specific.

Q. So a person might take great quantities of it without injury.

A. Not necessarily great quantities, but fair doses.

Q. So that in a case of that kind, it might be possible to take forty grains for a period of four or five days without injury.

A. In some of these cases of Nephrosis, the dosage was as high as sixty grains a day for a long period.

Q. What do you mean by Nephrosis?

A. Nephrosis is that kidney involvement which involves primarily the tubules which fills up certain things in the blood stream before elimination. It also includes fatty changes, it also includes Nephrosis of the kidney, perhaps due, many of these, to other conditions present in the body.

Q. What I am trying to get at, is, is it not a fact that a person with defective thyroid glands is more apt to take thyroid in large quantities without injury than a person whose glands are normal?

A. If the condition is a hypo-state, yes. The defective gland might be a hyper condition. Those patients are not obese. There is some disturbance, not only in the thyroid itself, there is some change in the molecule, some inter-change that is not definitely understood why it does occur, it is an entirely different state.

Q. In certain kinds of obesity, such as myxedema, they can take more thyroid than they can in other kinds of obesity, is that a fact?

A. Well, it is a specific in myxedema.

Q. Did I understand you rightly, that a person could take without examination, without medical attention, forty grains of thyroid in five or six days, when you stated that, did you have reference to the condition of myxedema.

A. I don't recall that statement.

Q. You did not make that statement?

A. I don't recall that statement. I said to raise the metabolic rate, it would be necessary to take at least that much.

Q. You did not wish to be understood as saying at this time that a person can with safety take forty grains of thyroid without physical examination by a competent physician in a period of five or six days.

A. I do not recall making that statement.

Q. You did not make that statement?

A. No, I don't recall that.

Q. If you did make that statement, you mis-spoke yourself and you don't wish to be understood that way.

Mr. Cantwell: No, I object. He did not say that.

Examiner Averill: No, he never said that without examination a patient could take forty grains.

Mr. Hornibrook: Well, our memories differ as to that. He may not have said without examination, but I understood him to say that he could take it with safety.

Examiner Averill: He did not say without examination. He was speaking of where it was being prescribed and they could take as high as forty grains, and he went on to state at times he has given fifty grains, but he did not say a person could without examination by a physician take with impunity for that period, or any period, forty grains.

By Mr. Hornibrook:

Q. If you made that statement, you wish to qualify it now.

Mr. Cantwell: I object, he did not make the statement.

Mr. Hornibrook: Well, the record will speak for itself, and if necessary, we will go back and take the time to look at the record.

Examiner Averill: We won't take the time to read that, because the witness never said that without examination a patient could take with impunity forty grains for any period.

Mr. Hornibrook: I don't think he meant with examination at all, but we will let that go.

Examiner Averill: He said they could take it and he was speaking of a patient, he was speaking of an experiment that had been reported.

Mr. Hornibrook: Well, we will have to differ about what the record states, but I want to clear this up.

By Mr. Hornibrook:

Q. Now, Doctor, about the Epstein experimentation. How much thyroid did you say those boys took in that experimentation?

A. In some of these cases of Nephrosis, as much as sixty grains were given. That was the maximum, sixty grains a day.

Q. Was that always done under the advice and care of a physician?

A. Well, they were in a hospital, and that was the medicant that was given. These cases were edematous,

there was edema in the tissues as well as ascitias in the abdomen.

Q. That means water in the stomach?

A. Water, not in the stomach, but in the peritoneal cavity.

Q. Would that condition permit a person to take a larger dose of thyroid without toxic symptoms?

A. Apparently there was no toxic condition with these doses.

Q. Would that condition prevent the toxic condition?

A. It was apparently a hypo-thyroid state.

Q. And in those states they can take these large doses?

A. Thyroid is a specific in many of those cases.

Q. And in those cases there would be no toxic symptoms.

A. It might not remain that way. The treatment might correct the condition so that later on they might have ability to respond to larger dosage than that.

Q. Is it not a fact, Doctor, that the taking by a certain patient of two grains of thyroid over a period of sixty to ninety days might produce toxic symptoms.

A. It might.

Q. Are you familiar, Doctor, with the laxative called Dilaxine?

A. No, I am not familiar with it.

Q. Assuming that that laxative is similar to the other two laxatives referred and that are recommended to be taken and are taken, just read the directions on that Dilaxine, and assuming that that has the same potency as the two laxatives in Marmola and that Marmola is taken for a period of sixty to ninety days at the rate of two grains a day, and the laxative Dilaxine is taken in accordance with the instructions you have read there, would that tend, in your opinion, to create the laxative habit of the patient.

Mr. Cantwell: I object to the question.

Examiner Averill: Why?

Mr. Cantwell: He says two grains of Marmola.

Mr. Hornibrook: Well, two grains of thyroid, then.

Mr. Cantwell: I object further on the ground that it talks about Dilaxine. There is nothing in the complaint about Dilaxine—Well, I will withdraw the objection, although there is no allegation as to that.

Examiner Averill: This question only assumes, and you have a right to ask a question embodying a hypothetical condition of an expert, and he is asking here simply for an assumption: because the witness says he knows nothing about Dilaxine himself. Now he is asking him if that Dilaxine has the same potency as the quantities of the two laxatives mentioned in the Marmola Formula if certain things would occur.

Mr. Cantwell: Well, to save time, I will withdraw my objection and let him answer.

(Question read.)

A. I will answer that question in this way. In my opinion, if this has a similar strength to the laxatives in the Marmola tablets; then we are simply doubling the strength of the laxative in the Marmola tablets, which would still keep the dose of the laxative well under the U. S. Pharmacopoeia dose for each one of the two laxatives, and I would still maintain that twice as much as is in the Marmola tablets of the laxatives would not necessarily cause, and would not cause the laxative habit.

Q. Might it?

A. I don't believe it would.

By Mr. Hornibrook:

Q. Would it retard the bolus?

A. Well, it might in some cases. It states, however, on the package there: "If it is needed." And if the amount of laxative that is in the Marmola tablets is not sufficient to produce evacuation, I would say that this amount in addition would not cause any irritation.

Q. Do you prescribe Marmola in your profession?

A. No, I do not.

Q. When you stated in your testimony that the two grains of thyroid administered once a day, or in half grain tablets four times a day for a period of sixty to ninety days, that it might be done with safety, you referred in your testimony at that time, did you not, to the average person who is obese and otherwise healthy? But you would not say that that dose could be administered in those quantities for that period to an unhealthy person with safety?

A. The term, "unhealthy," I do not apprehend.

Q. Going on back, then, to the picture or that par-

ticular kind of kidney trouble which you testified as cardial-vascular.

A. I would not prescribe it in that particular type of case.

Q. You would not deem it safe to prescribe, would you?

A. It might be prescribed with safety, but I would not prescribe it.

Q. And a person with an accelerated heart, what would you say about prescribing that amount for that period of time?

A. I would not prescribe it. I would not prescribe it in the case of an attack of rapid heart. I would not prescribe thyroid.

Q. And the reason is that in your judgment would not be safe?

A. I would see no indication for prescribing it. If it were indicated, I would not hesitate to prescribe it, but I would not see an indication if we had a rapid heart, and the cause is not diagnosed, I would see no indication for prescribing thyroid.

Q. Would not the administration of thyroid in those quantities for that period of time tend to accelerate the heart?

A. Not in an obese person who is otherwise healthy.

Q. Then why wouldn't you prescribe it?

A. In the first place, from what you said, we have not made a diagnosis for the reason for the rapid heart, and unless we made a diagnosis of the cause of the rapid heart, I see no indication for prescribing thyroid. Thyroid would not be prescribed as a medicine to be used in the case of a rapid heart. There are other things you might use.

Q. We will assume this is an obese person with a rapid heart, and as I understood your testimony heretofore, you would not prescribe thyroid in a case of that kind.

A. Oh, you have any amount of obese persons with a rapid heart. An obese person with a rapid heart would probably not remain obese.

Q. Well, assuming that they do.

A. Well, I would not prescribe thyroid.

Q. Is it not a fact that many obese persons do have a rapid heart because of the increased load that the heart has to carry?

A. They might have an increased exertion because of the excess load they are carrying, but if the heart would

quiet down after a rest, after sitting, that would be another matter. I might prescribe it then.

Q. But if it did not, you would not.

A. No, if it was an undiagnosed case, I would not prescribe thyroid.

Mr. Hornibrook: I think that is all.
Mr. Cantwell: That is all Dr. Stone.
Examiner Averill: Thank you, Doctor.
(Witness excused.)

Examiner Averill: We will now adjourn until 10:00 tomorrow morning.

(Whereupon at 4:00 P. M. an adjournment was had until October 26, 1928, at 10:00 A. M.)

Chicago, Illinois, October 26, 1928.

Met pursuant to adojurnment, 10:00 o'clock A. M.

Before

Edward M. Averill, Examiner.

Appearances:

Edward J. Hornibrook, Washington, D. C., for the Federal Trade Commission.

R. M. Connor, 560 Equity Building, Detroit, Michigan; Rockwell Gust, 2214 First National Bank Building, Detroit, Michigan, and Robert E. Cantwell, Jr., 1105 Hartford Building, Chicago, Illinois, for the respondent.

PROCEEDINGS.

Exam. Averill: You may call your next witness, gentlemen.

Mr. Cantwell: Dr. Tenney.

ALONZO C. TENNEY was thereupon called as a witness, and having been first duly sworn, testified as follows:

Direct Examination by Mr. Cantwell:

Q. What is your name?
A. Alonzo C. Tenney.
Q. Where do you reside, doctor?
A. 1528 Jonquil Terrace, Chicago.
Q. What is your profession?
A. Medicine and surgery.

Alonzo C. Tenney

Q. Are you licensed to practice medicine in the state of Illinois?

A. I am.

Q. Where is your office located?

A. Field Annex Building, 25 East Washington.

Q. Where did you receive your education?

A. I received my medical education in Chicago, at the Hahnemann Medical College, graduating from that institution in 1895.

By Mr. Hornibrook:

Q. What college, doctor?

A. The Hahnemann Medical.

By Mr. Cantwell:

Q. That is when you graduated, in 1895?

A. Yes.

Q. Have you done any post graduate work in medicine?

A. Yes.

Q. Where?

A. I did post graduate work in the Chicago Clinical School, Chicago School of Electrotherepeutics, the University of Chicago, the post graduate department of Harvard University, some short attendance at the New York Post Graduate and at the Johns Hopkins University, just visiting the university for a short time, and some attendance at the Mayo clinics.

Q. Have you ever taught any subjects?

A. Yes.

Q. Will you tell us what they are?

A. I taught in the department of pathology and bacteriology at Hahnemann Medical College for about seven years, and I taught in the department of internal medicine at the Hahnemann Medical College. Then I was associate professor of physical diagnosis in the Illinois Post Graduate Medical School, where I taught for three or four years.

Q. What have been your hospital connections or appointments?

A. I have been connected with the Illinois Masonic Hospital ever since its establishment. I was a trustee for a few years. I am on the attending staff at the present time. I have access to practically every hospital in Chicago, but have the most of my patients at the Augustana and Henrotin Hospitals on the north side.

Q. Where did you have your interne work?

A. At Hahnemann Hospital in Chicago.

Q. Have you ever had any public health service?

A. Yes. I was an inspector in the Chicago public schools for about seven years and a supervisor of inspectors for one or two years, taking in the extreme south side of the city. I was appointed by the governor of the state of Illinois as a member of the Illinois Medical Examining Board for the state civil service.

Q. How long did you serve in that capacity?

A. Oh, I think it was four or five years.

Q. What medical societies are you a member of?

A. I am a member of the Chicago Medical Society, the Illinois State Medical Society, the Chicago Homeopathic and the American Medical Association.

Q. What honorary appointments have you held in the different societies?

A. I have been president of the Illinois State Homeopathic, chairman of the Department of Research and Internal Medicine, of the National Homeopathic organization, the American Institute of Homeopathy; member of the educational committee of the Chicago Medical Society: chairman of the Committee on Medical Legislation for the Illinois State Homeopathic Medical Society and member of the Committee on Medical Legislation of the North Shore Branch, Chicago Medical Society, and chairman of the Committee on Medical Legal Defense for the Illinois State Homeopathic Society. I held that last position for fifteen years or more.

Q. You are also in the general practice of medicine in the city of Chicago?

A. Yes, specializing in diagnosis and internal medicine.

Q. Diagnosis and internal medicine?

A. Yes.

Q. Have you had occasion in your practice, doctor, to become familiar with the thyroid gland and its functions?

A. Yes, I have.

Q. Have you used in your practice thyroid medication?

A. Yes, I have.

Q. From your use of thyroid medication and your training and experience and knowledge of thyroid medication, for what ailments, would you say, is it being prescribed by doctors or have you prescribed it?

A. I have found thyroid a very valuable remedy. I

have used it since I graduated 33 years ago. I prescribe it in practically all cases of sub-oxidation.

Q. What do you mean by sub-oxidation?

A. Where the patient's basal metabolic rate is below normal; I prescribe it in senility, in defective development of children, in myxedema and in cretinism, in certain skin diseases associated with harsh dry skin, brittle nails, loss of hair, faulty digestion. I prescribe it in organic heart disease and organic kidney disease where there is fibrosis, where the circulation through those organs is poor, as shown by the urinilysis, blood pressure and other tests. I prescribe it in certain mental disturbances, and where I wish to enhance the function of certain endocrine glands I use it as a supplementary treatment for all of the endocrine defects. I prescribe it in my experience in practically every case of obesity that I have had for treatment. It is very effective in the treatment of obesity.

Q. Is thyroid available to the public without a doctor's prescription?

Mr. Hornibrook: Now, that is immaterial. I object to it on that ground.

Exam. Averill: If the doctor knows whether it can be procured at drug stores without prescription, I think he can so state. The objection is overruled.

A. It is. It is purchasable the same as quinine or calomel or laxative pills or any other non-poisonous drug.

By Mr. Cantwell:

Q. Doctor, you say that you have used thyroid practically since you have been admitted to practice medicine.

A. Yes.

Q. For the different classes of ailments that you describe?

A. Yes.

Q. Will you tell us about the use of thyroid in chronic heart cases?

A. I got my cue to the possible benefit of this thyroid material in chronic heart conditions in observing the great vascularity which is present in patients who suffer from excessive amounts of thyroid secretion. The capillaries are dilated. Circulation through all parts of the body is greatly enhanced. It is this increased circu-

lation and capillary dilatation which cause many of the symptoms and explain many of the actions of thyroid.

These chronic heart conditions, especially chronic myocarditis, where there is some effective agency operating in the body, we know there is a very marked diffuse deposit of fibroid tissue in the heart muscle. The autopsies which I saw in the Massachusetts General Hospital when I was doing post graduate work at the Harvard University brought that out especially.

Thyroid causes a dilatation of the little capillaries that still remain in those tissues. Circulation to the heart muscle is carried not by the muscle tissue but between the bundles of muscle tissue in what we call the fibroid connective tissue, and it is this fibroid connective tissue which is overgrown and which in its growth pinches off or pinches out some of the capillaries, which accounts for the incident of or the occurrence of what we are pleased to call angina pectoris.

So in order to overcome that improverished blood supply, I started fifteen years ago to prescribe thyroid in those cases. It has seemed to me that it has been very helpful. I have one patient who has taken small doses of thyroid almost continuously for nearly fifteen years with very good results.

Q. In chronic heart trouble?

A. In chronic heart trouble, yes.

Q. Do you consider thyroid a drug, doctor?

A. No, I do not.

Q. What do you consider it?

A. I consider it should be grouped in the class of remedies that we call biologicals. Medicines or remedial agents may be classified in several groups. I will not discuss physiotherapy or electro-therapy, but simply drugs and things that I would not classify as drugs.

Take castor oil. It comes from the castor bean. The castor bean is not a food vegetable.

Nux vomica or strychnia come from the bark of a tree. Nobody eats the bark of that tree as food. Quinine the same way.

Now, when we come to this other group of preparations that are made from the bodies or portions of the bodies of the food animals, we are dealing with substances which are normal to the human body and they are normal to the bodies of the animals that we consume. All mammals have thyroids.

In the good old days when we had head cheese as an article of diet, thyroid, taking the neck in with the

head, would be chopped up and be a constitutent part of the food of man. Now we are more particular about the selection of our food and we miss some of those essentials.

A certain amount of thyroid is essential to health and it is advisable if it does not occur in the food that it or its ingredients be derived from some other source.

For that reason I regard thyroid as a biological, the same as pituitary substances, spleen, brain substance, bone marrow, tessellated epithelium, the bio salts, and all of those preparations which are grouped by the manufacturing chemist as biological products.

Q. Doctor, what has been your experience with thyroid medication in kidney diseases?

A. I have used thyroid medication in the treatment of nephrosis. That is the grouping which we are pleased to use today covering that group of pathologies in the kidneys which have to do with the interstitial connective tissue.

You understand that all organs are built up of a frame work which supports the cells. There are spaces between the cells where the blood vessels and nerves and lymphatics, the afferent and efferent vessels all travel. So in pathology we make a general division between parenchymatous diseases which involve the true tissue, the true secretive cell of any organ, and its frame work, on the other hand, which we call the interstitial structure, between the true tissue structure.

In all of these fibroidic kidneys, where there is either a large fibroid kidney or a small contracted fibroid kidney, I have used thyroid at some time in the course of the treatment—if I have ever failed to do it it has been an oversight on my part—with very good results.

To vascularize that organ, to get the blood capillaries started, to get circulation into the cells, to carry the blood to the cells, and to carry the waste product from the cells, that has been the theory of the prescription.

Q. Doctor, why do you use thyroid substance in sub-oxidation cases?

A. Because long before the basal metabolic rate instrument was discovered or invented, rather, it was observed clinically that those cases which suffer from low combustion conditions in the body, a person who was easily fatigued, who did not have a good lung capacity, who breathed in a shallow manner and showed other evidences of defective oxidation, like a furnace that is burning low and stopped with clinkers. It was recognized that

these people were distinctly benefited by the administration of thyroid, and upon that observation and my own clinical experience, I started to use thyroid in these cases and have continued it.

Q. Doctor, what has been your experience with thyroid medication in the treatment of obesity?

A. It has been moderate as to degree. I do not specialize in the treatment of obesity, but I have a certain number of patients who insist on having some assistance and medical supervision, or whatever it might be. They come to me for advice and direction about reducing. In these cases I have used thyroid as my chief remedy, sometimes associated with other glandular extracts, but simply to make up the deficiency.

For instance, if I have a woman with a defective ovarian function, a scanty menstruation, and I want to stimulate the ovarian function, I give here ovorian substance or extract, and accompany it with a dose of thyroid.

One of my favorite prescriptions has been a tablet prepared by Burroughs Welcom & Company of London, England. It contains a half a grain of thyroid along with the ovarin and other endocrine glands. I mean a fifth of a grain of thyroid. It has seemed to serve me very well. I have had a couple of cases of extreme obesity that I was not successful with, could not keep them under my control long enough to make the reduction. Outside of that, I have been uniformly successful.

Q. In all of your obesity cases, doctor, have you used thyroid medication?

A. At some time in the course of the disease. As far as I can recollect, I do not recall any exceptions.

Q. Doctor, what has been the range of the dosage of thyroid given by you in the average obese case?

A. In the obese cases I generally begin with two-fifths to a half a grain, and then increase it. The range would run up to as high as five or ten grains three times a day.

Q. Define to us, doctor, the term "metabolism."

A. Metabolism is a term which is very inclusive. Take it in the lower forms of life, the amoeba, for instance, is observed to engulf its food and then digest it by secretions from its own body wall. Then it converts the products of digestion into its own structure, carries out its life activities and moves and reproduces, and so forth, casts off certain waste products at the end of its use of the molecular or chemical elements that it has absorbed from its food.

All of this process is included in the term metabolism. In the higher forms of life the same process is going on with every living cell. In the human body every cell is absorbing nourishment from the blood, from the fluid in the tissues. It is converting this nourishment into its own use. It is reproducing its kind and maintaining the body structure. It is finally casting off the waste products into the efferent and outgoing vessels to the capillaries and lympthatics and interstitial spaces, and then they are taken up and carried off and eliminated from the body by the special organs of elimination, the lungs, the skin, the mucous membrane, the kidneys, and so on. This whole process is included in metabolism. The whole process of life, except possibly actual reproduction, is covered by the term "metabolism."

Q. What relation has the basal metabolic rate to metabolism?

A. In the search for some means of estimating the speed of metabolism in the human body, the chemists pointed out the fact that all final process were processes of oxidation and in order to measure that process of oxidation the instruments which were being used—there are several varieties of instruments—were invented. These, however, take cognizance of nothing except the oxygen consumed, that being regarded as what we are pleased to call the basal metabolism.

It takes no account of the carbonizing processes, the hydrogenizing processes, the phosphorizing processes, the nitrofying processes. All of the other interchanges in which oxygen does not of necessity enter are going on and going on in spite of all we can show of the metabolic rate.

Furthermore, there is a certain amount of oxygenation going on through the skin. The basal metabolism takes no cognizance of that, on any of the instruments that I am acquainted with. Simply the amount of oxygen consumed through the lungs.

So, although the basal metabolic rate as shown by the Sanborn or other instruments is a valuable adjunct in the hands of skilful operators under proper conditions, in the absence of a lot of biological processes, such as nursing, pregnancy, fevers, tonsilitis, excitement, a full meal, and things of that sort, any one of them will destroy the value of the metabolic rebound. So I say under perfect control, in the hands of an expert, it has some distinct value; otherwise, very little.

Exam. Averill: In other words, then, you mean that in order to get an accurate, absolutely accurate metabolic rating, as I might term it, so many conditions of the patient or the person under observation have to be taken into account that it is extremely difficult to arrive at any positive degree of accuracy, except when all those conditions can be met, is that the idea?

The Witness: Yes, except when all of those conditions are met. Then it is quite accurate.

By Exam. Averill:

Q. I mean by all those conditions being met, if the patient being subject to this test, unknown to the operator in his mind was being disturbed by some condition that he knew existed at home, for example, it would have its effect upon the rating he would finally obtain, would it not?

A. You are quite correct. That is exactly the idea.

By Mr. Cantwell:

Q. Have you found it necessary to give your patients a basal metabolic rate test before the administration of thyroid?

A. No, I have not.

Q. Have you found it necessary to give your patients basal metabolic rate tests to control the administration of thyroid?

A. No, I have not.

Q. Do you regard obesity as a disease?

A. Yes, I do.

Q. Will you explain your answer?

A. Again we come to the classifications which we are pleased to use. At the present time, I think the classification of diseases into two great groups, infectious and metabolic, probably will answer for the purpose of this discussion. In the metabolic diseases we include all of those diseases which are due to excess activity or decreased activity of certain structures, such as the endoctrine glands, deficiency diseases, such as ricketts and scurvy and such metabolic diseases due to defective functioning, such as diabetes.

Obesity, except in extreme cases, I would regard as a mild disease, but nonetheless a disease of metabolic origin, due to loss of balance between intake and output.

In this connection I personally am pleased to regard

the person who is obese and has an enormous appetite and will not exercise and will not control his appetite as suffering from a condition which influences his mental processes as well as his physical.

Q. What is the action of thyroid substance when used as a remedy for obesity?

A. It produces dilitation of the capillaries travelling the fat tissue, increasing the oxidation of the fat. It speeds up the oxygen metabolism throughout the entire body. But oxygen simply carries off waste products. It does not, in my observation, attack healthy tissue. It is true that there is a decrease in the blood sugar and a decrease in the total fat content of the body after a course of thyroid medication.

Q. Will thyroid medication reduce obese people?

A. Yes.

Q. Does the administration of thyroid substantially increase the metabolic rate of all persons to whom administered?

A. Yes, I believe it does, if they really get an active thyroid substance, a good thyroid substance.

Q. Doctor, I will show you Commission's Exhibit 3. This is known as the Marmola package with the Marmola booklet. You have had occasion to consider the prescription as put out in the booklet, have you not?

A. Yes, I have studied this booklet and the literature that goes with it, all of the labels.

Q. State whether or not the use of that prescription by an obese person will reduce fat.

A. In my opinion, it will.

Q. Doctor, it has been said in this hearing that thyroid is a drug, many times more powerful than strychnine. Do you concur with this view?

A. I cannot.

Q. Will you explain your answer or your reasons for not concurring with that view?

Exam. Averill: Has not the doctor already explained that? I do not want to cut him off, understand.

Mr. Cantwell: He has not explained the reason why it is not as powerful. It has been said here it is a drug more powerful than strychnine.

Exam. Averill: Yes. Let him confine himself to that.

Mr. Cantwell: Yes, just to that.

Exam. Averill: And not let him again tell us about his opinion as to it not being strictly a drug.

Mr. Cantwell: Yes.

Exam. Averill: I just want to avoid the repetition.

Mr. Cantwell: I understand.

By Mr. Cantwell:

Q. What is your answer, doctor?

A. Following your suggestion, your Honor, and confirming myself to the action of the two things, strychnine is a poison. The latest studies in pharmaco-dynamics show that it acts in paralyzing the inhibitory center in the spine, thereby destroying the nervous balance in the cerebral nervous system, and as a result of this destruction of balance, the central ganglia receive without any tuning down, if I may use that expression, all impulses from the outside, the senses, sight, hearing and react so violently that the patient is thrown into convulsions through the motor route, that is, the reaction as to the motor route. This involves all of the organs, all of the muscular structure of the body, including the respiratory muscles, and if the dose be sufficiently large, the heart muscles are enlarged and the patient dies a violent death.

Thyroid is a normal constitutent of the body and in large doses can do nothing more than increase the chemical changes of the body so that they are sped up to an increased rate. The patient becomes alert. They have no convulsions. They prespire but they do not go into collapse. They have a tremor, but that tremor never develops into a general spasm.

If they take large doses for quite some time, they might lose rapidly in weight, but they would not die. So I see no logical or medical or any other reason for making any comparison. The two are as distinct and different in their action as the tropics and the poles, more so because there is one condition where there is simply an absence of heat and an excessive heat, but this is entirely different. It is outside the picture of thyroid action and cannot be compared with it.

Q. Calling your attention again, doctor, to Commission's Exhibit No. 3, the prescription, would you say that the administration of this prescription on dosages of one tablet four times a day would be dangerous to the average person?

A. Keeping in mind the direction, I would say not.

Q. Would the laxative content in this prescription

cause a person taking it in the dosage heretofore mentioned, for sixty to ninety days, cause the laxative habit?

A. It would not.

Q. And why? Give us your reasons, doctor, why it would not.

A. Well, the action of the the chief laxative ingredients, cascara sagrada and phelophthalein are complemental. Cascara sagrada begins a little higher up in the intestine to exert its impulse. Phenolphthalein works on the lower segment of the intestinal tract, through the colon and the rectum. So that in both cases we simply have a transudation of fluid, an increase of peristalsic movement.

The action of these remedies is not drastic, paralyzing, over-stimulating, nor in any way do they exhibit the action of drugs that do produce constipating habits, such as the salines. Furthermore, the dose here is the minimum usual accepted dose for a mild laxative. Furthermore, the time, sixty to ninety days, is a very small period of a person's lifetime to form a constipating habit. You can take almost any drug for a reasonable length of time without forming any habit.

Q. Doctor, you have examined the instruction book which is enclosed with the Marmola preparation?

A. Yes.

Q. Doctor, in your opinion, will the taking of the Marmola preparation according to these instructions, directions and advice be effective to reduce the obese?

A. Yes.

Q. Doctor, in your opinion will the taking of this Marmola remedy according to these instructions, directions and advice be safe?

A. Yes.

Q. Doctor, in your opinion, will the taking of this remedy according to these instructions, directions and advice, act with uniformity upon the users thereof?

A. Yes. But I would like to explain the use of the word "uniformity" which I am pleased to accept in this connection.

I do not want your Honor to understand that I believe that if we had a string of obese persons, ranging from maybe 200 pounds overweight to 25 pounds overweight, that they would all be reduced by this dose in uniformity.

If I may make a comparison, let us assume that a man was $10,000 in debt on one end of the line and a man $10 in debt at the other end of the line, and that they all had

legal access to a minting machine which would push out to each one of them one penny every minute. It would take the man who owed $10 a comparatively short space of time to pay off his obligation, which it would take the man who owed $10,000 much longer.

What I mean by uniformity in this question, the use which I have in mind is that it does not make any difference whether a man is 200 pounds overweight or 25 pounds overweight; in so far as this little penny's worth of energy goes, it is acting equally on both bodies, assuming that these are normal people except for their obesity and that the thyroid employed is uniform in each instance.

Q. Dr. Tenny, can this Marmola remedy be taken for the average case safely, according to these directions, instructions and advice, without consultation with a doctor?

A. Yes, it can.

Q. Doctor, in your opinion—

A. Now, you understand that in that answer I have in mind the instructions, which are if any unusual condition arises they are to consult a physician.

Q. That is in the book?

A. That is in the instructions, yes, sir.

Q. Dr. Tenny, in your opinion, would this remedy if taken according to the instructions, directions and advice contained in the booklet, constitute a scientific treatment for obesity?

A. In my opinion, it would.

Q. In your opinion, is this Marmola formula based upon scientific research and accuracy, and what are the reasons for your opinion?

A. Yes. And the reasons for my opinion are that all of the active ingredients are preparations which have been known to the medical profession for many years. They have all been subjected to careful clinical and laboratory study. They have all been standardized as to the active principles. Cascara has been standardized, and the thyroid and the thyroxin and the iodine content, all of those things have been standardized. Then whoever combined the elements in this formula has done so with due regard to the usual, average safe dose. Therefore, I feel it is right to regard it as a scientific formula.

Q. In your opinion, would you say that this Marmola prescription of thyroid combined with laxatives and accompanied with the instructions, directions and advice above mentioned in the booklet, is a practical and available remedy for the average case of obesity?

A. Yes, in my opinion, it is.

Q. Would a half a grain of thyroid taken four times daily in the combination above described and under the instructions, directions and advice in the booklet, produce toxic symptoms in the average obese person, otherwise healthy except for their obesity?

A. In my opinion, it would not produce toxic symptoms.

Q. Doctor, would a thyroid compound which contained a half a grain of thyroid substance, a quarter of a grain of extract of cascara, and a quarter of a grain of phenolphthalein given four times a day for from sixty to ninety days, and using the same dosage as in the previous questions, be useful and effective in dissolving and removing excess fat from the human body?

A. In my opinion, it would.

Q. Would you say that the above mentioned thyroid compound, that its medical properties are safe, pleasant and effective in their action in the removal of excess fat from the human body?

A. I have not prescribed Marmola, so I cannot state as a matter of fact that they are, but in my opinion they would be. I have used every one of these ingredients in practically the same proportions, with very good results.

Q. Would you say that the above mentioned thyroid compound may be used by the purchaser thereof without discomfort, inconvenience or danger of harmful results of the physical health of such users thereof?

A. I am not sure that I get that,

Q. Would you say that the above mentioned thyroid compound may be used by the purchaser thereof without discomfort, inconvenience or danger of harmful results of the physical health of such users thereof?

A. Assuming that those users are obese individuals, yes, it would be safe.

Q. Dr. Tenney, would you say that the thyroid compound known as the Marmola prescription is a scientific method for the treatment of obesity and is based on many years of scientific research in the United States of America and foreign lands?

A. In my opinion, it is.

Q. Doctor, would you say that the thyroid compound known as the Marmola prescription mentioned above would be sufficient to be generally effective for the reduction of excess fat of the users thereof without impairing the health of a substantial portion of such users and with-

out danger of bringing to such substantial portion injurious results to physical health?

A. I think it would be safe and effective. Does that answer the question?

Q. Yes. Would you say that thyroid when introduced in the human body is a powerful agent, liable at all times to produce radical changes of conditions that will be harmful to the users thereof?

A. No, I cannot agree to that proposition.

Mr. Cantwell: Cross-examine.

Cross-examination by Mr. Hornibrook:

Q. Doctor, in answer to the questions put to you, the last several questions have been based upon this supposition, have they not, that Marmola would not be injurious to the average person if taken as directed, is that the fact?

A. I think the questions were a little more inclusive than that, or, if they were not, the answers were a little more inclusive.

Q. You did not mean to convey by your answers that Marmola taken as directed could never be harmful, did you?

A. No.

Q. When an obese person comes to your office for treatment, do you submit them first to a careful physical examination?

A. Yes.

Q. Just give us what that physical examination consists of, doctor, if you will.

A. You see, I am a specialist in diagnosis, so possibly I make a little more exhaustive examination. I may even be accused of selling the patient a little more service than some others would. I make a determination of the weight, blood pressure, pulse, temperature. I make a note of the time of day the examination is made. I get a personal and family medical history. I examine the teeth, the tonsils, the nose, the throat, the eyes. I examine the hair, the skin, the nails. I examine the gait, to determine what the reflex reactions are. I have a routine blood examination, including a Wasserman and a urinalysis in every case. That is my minimum routine examination, for which I charge $25.

Q. You make an examination of the heart also, do you?

A. Yes.

Q. Do you use anything in obesity cases other than thyroid? Do you prescribe exercise or diet?

A. Yes, unless the patient has previously put themselves on the proper diet. The average person who seeks the advice of a physician needs diet regulation. Our diet habits are very bad as a race.

Q. And unless you find that they have placed themselves on the proper diet, you prescribe the specific diet, is that a fact?

A. I have answered you.

Q. Do you also prescribe exercise?

A. Very little. I inquire as to their vocation and their avocation. If they play golf or walk five or ten block to the station in the morning and in the evening, if they are up and around on their feet during the daytime, especially if they are in and out of their offices and things of that sort, I do not make any special recommendations as to exercise.

Q. After this examination, you start them out on thyroid at a fifth of a grain a day, is that the fact?

A. No, I said two-fifths to half a grain.

Q. A day?

A. It happens that the tablet I favor myself is one-fifth of a grain to each tablet, so I give them two tablets three or four times a day to begin with.

Q. How much does that amount to a day?

A. Two-fifths of a grain given four times a day would be eight-fifths of a grain.

Q. Eight-fifths of a grain?

A. Almost a grain and a half.

Q. Then do you require the patient to come back for another examination?

A. Patients under my care are told before I begin that I do not wish to take the case unless they are going to follow instructions and place themselves under my directions for a certain period of time. It depends on what the ailment is as to how long I indicate in my opinion it will be necessary to carry out medical supervision.

Q. You said, I believe, in your testimony that you at times had increased the dosage up to five grains a day.

A. Five or ten, three times a day. That would be from 15 to 30 grains a day.

Q. Fifteen to thirty grains?

A. Yes.

Q. If a patient came to your office suffering from obesity, and you started them out on this two-fifths of a

grain four times a day, would you permit them to increase that dose to as high as ten grains without an examination?

A. If a patient is under my care I expect him to let me determine those things.

Q. And come to you for an examination before you would permit him to take that increased dosage?

A. Yes. I may illustrate my position toward the patient. If you want a suit of clothes and you go to the store and buy a suit, that is your affair, but if you want a tailor to build you a suit he takes your measurements and you hope to get a little better appearance in the final result than you would from the handmedown.

Q. Yes.

A. If a patient comes to me I take certain measurements— if he comes to me for the treatment of obesity only, I take certain measurements and I endeavor to serve him as a physician, hoping that we may by our joint efforts get a better, more lasting and more pleasant result than he would get if he simply went to the store and purchased the same ingredients and took them to the best of his ability.

Q. Now, doctor, assuming that a patient came to your office who is obviously obese and he said to you, "I want to get rid of this fat, this surplus fat that I am carrying around," would you in your practice give that patient two grains of desiccated thyroid a day for a period of from sixty to ninety days without an examination?

A. If he came to me as a physician, as I said before, I would insist that he place himself under my care. I may not make any change in the prescription, but I as a physician am selling my services to that man and I am going to insist on that, because, parenthetically speaking, I know he is going to hold me responsible for the result. I am going to insist that I have entire charge of it, and in order to do that I would want to see him from intervals varying from once a week to once in two weeks, and, as he progresses, once a month.

By Exam. Averill:

Q. In other words, doctor, you mean that while you may not always find it necessary to repeat all of the details of the initial examination, yet you desire that the patient shall return to you from time to time at such intervals as you may think the case requires, for your observation, is that the idea?

A. Yes, your Honor.

Q. That is the point I wanted to get at.

A. That is the function of a doctor.

Q. Yes. I just wanted to be sure.

A. Yes.

Q. The word "examination" has been used so often, I was afraid you were confining yourself strictly to the technical meaning of examination or the technical question of examination, and I had in view the idea that it was observation often, after the initial examination.

A. Yes. Well, there would be some examination made from time to time.

Q. Of course.

A. That is correct.

By Mr. Hornibrook:

Q. Doctor, you testified as to this language appearing in this little booklet: "Consult your own physician, if you want special advice in any unusual condition." I will ask you if after you had made your examation in the treatment of an obese person and prescribed thyroid, that you would say to that patient, "Now, if you find any unusual condition, I want you to return for further examination," or would you, on the other hand, define what unusual conditions he might expect which would warrant his return for further examination?

A. I am pleased in my practice in the main to withhold any description of unusual conditions which may occur, because patients are very suggestible and they approach this subject of reduction very often with great apprehension. They have very strange impressions about such things. In my observation, in my experience, to suggest a lot of symptoms which might develop would be to guarantee that they would develop.

Therefore, I do withhold in my practice—possibly my physical size or something I have in the way of stating things makes more of an impression on a patient than somebody else's way of doing it, but I would withhold any suggestion of an adverse nature. I would say if any unusual condition develops come back even before the time I have set. I use almost the language of this folder. I was surprised to find it there. I never before have seen it in anything of that nature sold to the general public.

Q. Do not you find in your general practice that many people come to you with an unusual condition and

they do not know anything about what those conditions are?

A. Yes, indeed.

Q. Is it not a fact that the average patient would not know what an unusual condition was?

A. No, oh, no.

Q. Would the average person—

A. The unusual condition that results from the administration of that formula would be very apparent to any intelligent person.

Q. I believe you testified that an overdose of thyroid would manifest itself in nervousness and dizziness, did you not?

A. No, I did not use the word "dizziness." I said nervousness.

Q. Nervousness.

A. Tremors and sweating.

Q. Tremors and sweating?

A. Yes.

Q. Does not that condition of nervousness usually come to a person without indicating any great physical trouble?

A. Are you speaking with reference to thyroid administration?

Q. Oh, no, not now. I am going to come to that later.

A. You are going into the general field of medicine?

Q. Yes.

A. That is another matter. Nervousness may be anything from the acute ravings of acute dementia to the apprehension of some woman who thinks her husband is out with his stenographer.

Q. That is probably true of a person who is perspiring, sweating abnormally, is it not?

A. Perhaps.

Q. I see.

A. That is, it may have a variation in cause?

Q. Yes.

A. Yes, sir.

Q. So that the average person might experience these two things, the nervousness and the sweating, which might be the direct result of the taking of thyroid, and yet it would make no impression upon their minds so that they would see the doctor?

A. No, your conclusion in absolutely erroneous. It is my experience there is absolutely no justification for your assumption.

Q. Everyone then that has a little nervousness or perspires a little bit more than normal comes rushing to your office to see what is the matter, is that the fact?

A. No. The patient who comes to you seeking reduction generally does not sweat enough.

Q. Does not what?

A. Does not sweat enough, and they are not nervous. They may be apprehensive as to how fat they are going to get, but that is not manifested by the symptoms that we call nervousness or tremors. If those patients go out taking my prescription containing thyroid and get nervous and begin to sweat, that is unusual for them, and therefore, they are going to come back and ask me about it. If it is something in the great field of medicine outside of obesity, which I have said is a minor ailment of metabolic origin, then the thing becomes so complicated that, as I said, I cannot agree to your assumption. It is all wrong. If the patient already has hyper thyroidism and has sweats and has a tremor, he is not going to get thyroid, and those sweats and tremors have become a usual thing with him and not an unusual thing.

Q. Your testimony then is that this Marmola, taken in the doses as prescribed for the period of sixty to ninety days, is not dangerous if the patient whenever an unusual physical condition develops seeks the advice of his own physician, is that the fact?

A. May I have that question re-read?

Q. Certainly.

(Question read as above recorded.)

A. Assuming that this patient takes Marmola for the purpose of reducing his obesity and follows the instructions therein, seeking the advice of a physician, if unusual symptoms develop I do not know of any safer forfula that can be placed in his hands.

Q. Now, doctor, I believe you have testified that the formula is a scientific formula.

A. Yes.

Q. You noticed the two ingredients there, the two drugs—I will call them drugs—bladderwrack and phytolacca.

A. Yes.

Q. Have they been standardized in the medical profession?

A. Not to the same degree that some of the others have, but they are drugs which I have used since my graduation in 1895. They are well known to the home-

opathic school and to the eclectic school. Bladderwrack is a sea weed and phytolacca is a pokeroot. They both have recognized clinical results following the administration.

Q. In obesity?

A. I would regard them in this formula as being placed there for what we call the synergistic action—I do not know how to spell it, but it means whereby combining with a small dose another preparation of a somewhat similar action you get an increased therapeutic effect without damage or danger to the patient.

I can best illustrate that with the recent discoveries regarding the use of megnesium sulphate in combination with morphine for anesthetic purposes. I imagine that is why they are put in, to increase the action without increasing the danger of the thyroid.

Q. Are those two drugs used by physicians of your school at this time?

A. Yes.

Q. Are you familiar with the Handbook of Therapy by Oliver T. Osborn and Morris Fishbein?

A. No.

Q. Let us see what you say as to these being the results of taking thyroid:

"Large doses may cause nausea, dizziness and if quickly absorbed faintness. There is probably no direct acute poisoning from thyroid, although large amounts have been known to cause convulsions and even death from shock, i. e., by the toxic effect on the heart and the enormous vasodilatations effect as has been seen in operations for exophthalmic goiter, when the thyroid has been too much manipulated and a large amount of its secretion has been absorbed."

A. Well, what about it?

Q. Just read the first part of my question, please.

(Question read as above recorded.)

A. I can answer that. It is divided into two things. First, the enormous dosage. I have no knowledge of my own direct observation where doses sufficient have been given to produce any of those effects.

Q. Have you any from books, doctor?

A. And so far as I am aware, that part regarding large doses is based upon animal experimentation. I have no knowledge of lethal doses of thyroid ever having been given to a human person.

The second part of your question refers to the sudden expansion of the thyroid secretion or toxin in operation.

That is one of the things recognized by surgeons and medical men. It is one of the hazards of an operation and is in no way comparable to anything which has entered in this case so far as from a medical standpoint is concerned.

By Exam. Averill:

Q. You speak of the results from operation.

A. Yes.

Q. You are not speaking there of thyroid that has been introduced artifically, let me say, into the system, but you are speaking of thyroid which is secreted in the glands or by the glands of the individual being operated upon, is that the idea?

A. Yes, your Honor, and a little bit more specifically if you have ever seen Dr. Crile operate down at Cleveland or Dr. Percy at the Augustana Hospital, with the neck swollen out here with thyroid as large as your two fists, they cut in and in the removal of this thyroid it is subject to unavoidable manipulation. That thyroid is so vascular that if you cut into it while it is still connected with its normal blood supply of that individual, the blood will spurt out of it just as if you would cut the juglar vein.

In that connection, parenthetically speaking, this quotation refers to the sudden and extremely dilating effect, vasodilatating effect, which dilates the capillaries so that the heart has no blood to contract upon and simply quits, or very little blood. It does not have the normal blood pressure. That is the end of my parentheses on that.

This patient being operated on is unavoidably subjected to the squeezing, manipulating, putting in of forceps and putting in the fingers, lifting out this matter, and by that process enormous quantities of this toxic thyroid substance is forced directly from the gland into the circulation before it can be removed. Do I make myself clear?

Q. Yes, but what I am getting at, if the case that you cite and as I understood your opinion, the case cited in the book—he did not cite a case, but he made a statement in the book he read from—that was a toxcidity which was created in the patient himself by the action of his own gland or of the diseased condition of those glands and not, as I understand from what you said—and I want to get that straight in my mind—not from the introduction, either orally, or if possible to do so by hypodermic injections of thyroid into the system, is that correct?

A. Your conclusions are absolutely correct as to what I mean and you have stated them better than I.

Q. I could not do that, doctor, because I do not know the terms, but I have tried to put it in a layman's way as I understand it.

A. Yes.

By Mr. Hornibrook:

Q. Doctor, assuming that an overdosage of thyroid did bring about excessive sweating, tremors, and cause an obese person to lose flesh very rapidly, would not that be apt to so deplete the system as to make the patient susceptible to contagious disease, more so than normally?

A. That is an unfortunate question for you, because it is just opposite. Thyroid is one of the great antitoxins manufactured in the body. The thyroid often becomes diseased in manufacturing toxin in chronic infections in the tonsils, teeth, the gall bladder and the appendix, and in throwing out this anti-toxic material it becomes irritated, and then we get a hyper-thyroidism.

Q. Do you mean to say that if a person took thyroid to such an extent that they have tremors, excessive sweating, that they are losing flesh too rapidly, that that thyroid is going to strengthen that patient's system so that they will throw off disease and not be so apt to take disease, is that your position?

A. Now, you exhibit the usual attitude of the layman, that a strong body is not susceptible to disease. When you stop to think, you know that the athlete is a mark for tuberculosis, that the runner is a mark for heart disease, that the man who swims tremendously is a mark for kidney disease, and so on. I might go on and show you how all of these evidences of physical strength weaken certain biological powers of reaction.

As a matter of fact, the power to resist infectious disease is not dependent upon muscular strength nor lung capacity. It depends on the existence in the body of anti-bodies, so-called, the exact nature of which we are not wholly conversant with, except in a very few cases like tetanus, meningitis and those diseases for which we have a specific germ. Outside of that we have an exact knowledge of the specific anti-bodies, but we do know this, that thyroid patients almost never develop post-operative pneumonia or any other infectious condition where they are suffering from an excessive thyroid action.

Q. Is thyroid administered in pneumonia?

A. No.

Q. Why not?

A. You go now and be operated on for pus infection or gall bladder and you may develop a post-operative pneumonia. Dr. Percy will operate from six to a dozen or fifteen thyroids every other morning and does it right here in Chicago exery day, and Dr. Crile is doing it in Cleveland, and I never heard of either one of those men ever having a post-operative pneumonia.

By Mr. Cantwell:

Q. You mean in thyroid cases?

A. Yes, those are all cases where they are suffering from tremor and tachycardia and profuse perspiration and all that sort of thing, and yet they do not develop those conditions.

By Mr. Hornibrook:

Q. What is this: taking away the thyroid gland, is that it?

A. Yes, or part of it.

Q. How does that substantiate your reasoning? You take away the gland. They have not administered any drug, and still those patients, you say, never have any pneumonia.

A. Maybe I can explain that. I think the judge understands.

Q. I hope he does.

A. Here is a patient who is suffering from excessive thyroid secretion in his own body. He has hyper-thyroidism and he has it to such a degree that a surgical operation for the removal of a large portion of that gland is deemed advisable. He is operated on. He does not have post-operative pneumonia. He takes ether. He does not have post-operative ether pneumonia, either, or anything of that sort.

Here is another thing that happens. I listened to a tabulation last winter of Kelly of Boston, telling how many thyroid operations he had done. I think it was twelve thousand. Tabulating the causes for quick mortality, I do not think there was a single case of death from post-operative pneumonia, which is an infectious disease.

On the other hand, you take your cases of operation for the amputation of an injured leg. A man comes in off a railroad who has had an accident. His rib is broken,

his appendix or gall bladder or he has stone in the bladder, the urinary bladder, I mean, or any of those things, and the danger from post-operative pneumonia is very distinct.

The lesson from that is that this thyroid intoxication, whatever else it does contrary to the patient's well being, does increase his resistance to infection from pneumococci, streptococci and staphylococci, which we speak of as infections. I do not know what reference it would have to the muscles, but in a practical way that thing stands out very distinctly. In these thyroid cases I have never seen or never had a thyroid patient who while they were actively sick with the thyroid ever developed bronchial pneumonia or tonsilitis, bronchitis, or any of those diseases.

Q. Of course, as you say, doctor, it is difficult for the lay mind to grasp that. I cannot see—possibly you can explain it—why doctors do not give us all thyroid all of the time and we will never have any contagious or infectious diseases.

A. Well, I have some patients who have been taking thyroid every day off and on for the last ten, twelve or thirteen years.

Q. Doctor, there are some afflictions of the human body in which the administration of the thyroid drug is not proper at all, is not that a fact?

A. Yes.

Q. What are they?

A. I know of but one, and that is exophthalmic goiter.

Q. Is it not a fact also, doctor, that it is not safe to administer it in the case of cardiac heart? What do you call it?

A. What is that?

Q. Endocarditis.

A. Endocarditis?

Q. Chronic endocarditis.

A. I know of no contraindications to its intelligent use in that condition. It might be very helpful.

Q. If you found that condition, doctor, you would administer it with great caution, would you not?

A. Here is the situation. In a case of endocarditis you are facing a good many things besides the little benefit which thyroid might offer in such a case, and it generally draws our attention to the proposition of saving the patient's energy, building up the heart muscle and all that sort of thing.

In my experience with thyroid I do not see that that

would be a medical contraindication to its use in small doses.

Q. In small doses?

A. Yes.

Q. If you found a patient of that kind, you would be very careful, would you not, before you administered it in the first instance and then before you increased it?

A. You handle that kind of a case carefully, anyway.

Q. Yes.

A. Of course, the nature of the case requires careful management.

Q. You would make examinations frequently to determine?

A. Oh, yes, the most of those cases are best put in the hospital.

Q. Are not there certain afflictions of the kidney, doctor, where it would be unsafe to administer thyroid?

A. I cannot think of any, except nephritis of the toxic goiter, the exophthalmic goiter. Of course, in all of these answers I wish it understood that the assumption on my part is that the dose is administered intelligently and cautiously by a physician. These are not the type of cases who are obese. They are not the type of people who are taking Marmola at the druggist's.

Q. Is not that a mere conclusion on your part? Is it not a fact, doctor, that—

A. That is all I am capable of giving you, my conclusion on anything.

Q. Yes.

A. My entire testimony is my conclusions.

Q. But is it not a fact that due to style or fashion many women who are not obese at all, in their desire to become more slender, are taking anti-fat remedies?

A. Yes, but here we find on page 17—

Mr. Cantwell: You are referring to Exhibit 3, the Marmola booklet, for the record?

The Witness: Yes. "Obesity is more than a deformity. It is now regarded in the light of a disease. When you see a person over-fat, you know that something is abnormal and people dislike the abnormal." then—I cannot find it just at this point. I think I ought to in answering your question read this quotation, because this book of instructions is the great saving factor in placing this remedy in the hands of the public, in my opinion.

By Mr. Hornibrook:

Q. Right there, doctor, did you have anything to do with getting that book out?

A. No, sir, I never saw it until a couple of months ago.

Q. Are you—well, you might answer that question before I ask another.

A. On page 15—

Mr. Cantwell: Of Exhibit 3.

A. (Continuing)—it says, "You neither wish to be abnormal nor subnormal in respect to fat." And in another place it advises against over-reduction.

By Mr. Hornibrook:

Q. Can you find that place?

A. On pages 25 and 26 it gives the weights as accepted by the life insurance medical directors and Actuarial Society of America as a standard, which is the same as medical men use for weight, and it advises against over-reduction. So it is not, as I read this, an incentive to the flapper who wants to look like a clothes rack.

Q. But it would reduce the flapper who wanted to look like a clothes rack, if she took that according to the instructions, would it not?

A. No.

Q. It would not?

A. The instructions tell her to stop when she has reached the normal, specifically.

Q. Are you connected with the Tenney-Sellers Laboratories?

A. No. That institution is defunct, as such.

Q. Did you organize it?

A. I was one of the organizers.

Q. What was its purpose?

A. It was organized for the purpose of doing X-ray work for and under the direction of the Veterans Bureau. We made the lowest bid and one of the men who is now, I believe, in Fort Leavenworth turned us down and awarded the contract to a higher bidder. I would like to have you go into that proposition. I never had the opportunity of airing it before a federal judge before.

Q. You have endorsed proprietary remedies before, have you not, doctor?

A. No, I have not endorsed this, in the sense in which

you use the word "endorse," but I am simply here giving scientific evidence, I believe. As a physician, naturally I am not keen about encouraging patients to get well by some other method than that which I offer.

Q. Are you familiar with the product mervenol?

A. What is that?

Q. Mervenol, are you familiar with that product?

A. There is a product Armevenol, and there is a product known as—what is that, Dr. Cramp, that other mercury product with copper?

Q. What is that?

A. They are products of Dr. Hille, the man who invented argyrol, and he had considerable difficulty getting recognition from you people. His things have served me quite well and I believe eventually they will get recognition.

Q. Is not mervenol a proprietary medicine?

A. It is not.

Q. It is not?

A. It is not any more than digitalis. It is a product which Dr. Hille makes on the north side. It is a colloidal mercury compound. Amervenol is a collodial mercury compound, arsenic and copper, used chiefly in the treatment of syphilis.

Q. Is it sold in drug stores?

A. Yes, and on prescription. It is not advertised to the public.

Q. It is not advertised to the public?

A. No.

Q. Doctor, is not the name trade marked on it?

A. It may be. I do not know as to that.

Q. You have endorsed that, have you not, publicly?

A. Now, I will tell you what I did in regard to that. Dr. Hille is a personal friend of mine. He invented argyrol. He claims that this was stolen from him by a partner in the business. He has since perfected another colloidal silver known as lunosol. Several years ago I had been using mervenol and armervenol in my practice—you understand these men when they have a new product, take it to some physician to make tests. I had been doing some of that work in obstinate cases of syphilis, cases where I had a continuously negative Wasserman no matter how much salvarsin, mercury or iodine I gave them. Then as time went on I had very good results with it. Dr. Hille asked me, knowing that I was somewhat acquainted with Dr. Cramp and some of his associates, what suggestion I could make to put him in the proper light

before these men. Hille, by the way, is roundheaded, determined, somewhat arbitrary, like all geniuses are, and I said, "Dr. Hille, I do not know but you claim that you are selling an awful lot of this material and that the prescriptions are being repeated and that physicians apparently are having good results. I would be willing to do this for you as a personal favor. I will prepare a questionnaire and send it around to a certain number of members of the Chicago Medical Society, asking them what their opinion is, if they have used your preparation."

Now, understand, this questionnaire was sent to physicians, not to laymen nor to druggists.

I did so, and we had a certain number of replies. We had some very interesting reading in looking over these replies. I do not know whether Dr. Hille ever used that information or not. In the main it was very favorable to him and his product. Now, I do not recall any other activity in connection with that proposition.

Mr. Hornibrook: That is all.

Redirect Examination by Mr. Cantwell:

Q. Doctor, are you familiar with Wine of Cardui?

A. Yes.

Q. Did you ever have occasion to testify as a witness in behalf of the American Medical Association of this Wine of Cardui?

A. Yes. I spent an entire day on the stand, being cross-examined by some of the most skillful lawyers, and razzed because I testified for the American Medical Association against an effort on the part of these manufacturers to sell whiskey as a medicine on the pretense that the little amount of medical element in their whiskey was effective because of its homepathic action. That was a very different proposition from this, and I was retained, spent many evenings and many days in conferences and study of literature, and finally in court listening in and finally testifying for the American Medical Association. They were so kind as to print my testimony almost verbatim in the Journal, which is very much appreciated.

Mr. Cantwell: That is all.

Exam. Averill: Have you gentlemen finished?

Mr. Hornibrook: That is all.

Exam. Averill: We are very much obliged indeed, doctor.

(Witness excused.)

Harold S. Hulbert

HAROLD S. HUBERT was thereupon called as a witness, and having been first duly sworn, testified as follows:

Direct Examination by Mr. Cantwell:

Q. What is your name?
A. Harold S. Hulbert.
Q. Where do you live?
A. Oak Park.
Q. Oak Park, Illinois?
A. Yes.
Q. That is a suburb of Chicago?
A. It is.
Q. What is your profession?
A. I am a physician.
Q. Where are your offices?
A. 185 North Wabash Avenue, Chicago.
Q. You are licensed to practice medicine in the state of Illinois?
A. I am.
Q. When were you so licensed?
A. In 1919, I think.
Q. You graduated in medicine?
A. I did.
Q. When?
A. In 1914.
Q. From what school?
A. University of Michigan Medical School, Ann Arbor.
Q. What post graduate studying have you done?
A. I studied there at Ann Arbor at the psychopathic hospital for three years for post graduate work; also one year as interne at the State Psychopathic Hospital and residence physician there for two years.
Q. Doctor, what has been the nature of your practice in medicine before the war?
A. Before the war, as I said, I was there three years, and occasionally in Detroit once a week as consultant in the juvenile court in mental cases. Then I left and went south with the Rockefeller people to Tennessee. My duty there was to notice and comment and recommend on the care of the insane at the county institutions in Tennessee, county poor farms and county jails. That was interrupted April 6th by the beginning of the war.
Q. What military experience did you have?
A. The first year of the war I was at Great Lakes as

a psychiatrist. I was a naval medical officer throughout the war, from the first day.

Q. That is Great Lakes, Illinois?

A. Great Lakes, Illinois, United States Naval Training Station. I was examining new recruits as to their mental suitability, and was consultant to the naval hospital at Great Lakes. I was also adviser to Captain Moffatt, now Admiral Moffatt, on delinquencies that appeared before him. Also I selected men for special ratings, like submarine men and radio operators, testing them as to their intelligence and particular fittness for their duties.

The second year of the war I was at sea, going to and from Europe. Going over my duty on the Leviathan was sanitary officer for the troops and returning I was a psychiatrist and brought home on an average of three hundred nervous and mental cases, a lot of shell shock, head injuries, nervous injuries, some insane, from France or England, bringing them back to New York.

Q. When did you return? Right after the war?

A. Of course, the wounded had piled up in France. I stayed in the navy a few more months, until March or April after the war was over, and then was retired to civil life.

Q. What rank did you have when you left?

A. Senior Lieutenant in the medical corps.

Q. What has been the nature of your practice since the war?

A. Well, at first, since the war and after the war, I did not do any practice. I was sick. Seven months later I convalesced enough to be up and around, and in a year or a few months more I went to work. For about a year I was at the Chicago State Hospital at Dunning on the staff. My health improved and then I started to practice in Chicago. My work since the war has been largely private practice here in nervous and mental diseases, associated with some teaching and some consultation work.

Q. What are your hospital connections?

A. Now?

Q. Past and present.

A. I had two short tours of duty at the Elgin State Hospital, but those were only a few months. The University of Michigan Hospital, Psychopathic Branch, for three years; The Naval Hospital at Great Lakes. The Navy Hospital at Brooklyn, South Bay—no, that is Boston—Bay Ridge. Chicago State Hospital. At the pres-

ent time at the University of Illinois Research and Education Hospital, consultant to Mooseheart, consultant to the Metropolitan Branch of the Y. W. C. A., and a few weeks ago I was appointed state medical officer of the American Legion, Department of Illinois.

Q. What have been your teaching positions, past and present?

A. I was instructor at Ann Arbor in Mental diseases. Now and since 1919 or 1920 or thereabouts—

Q. You mean the University of Michigan?

A. Yes. Since 1919 or 1920 I have been teaching at the University of Illinois, College of Medicine here in Chicago, first as instructor and now as associate in neurology.

Q. And you are teaching there at the present time?

A. Yes.

Q. What learned or scientific societies are you a member of?

A. Chicago Medical Society, Aux Plaines Branch, Illinois Medical Society, American Medical Society, Association of Military Surgeons, fellow of the American College of Physicians, American Psychiatric Association.

Q. What have you written on scientific matters?

A. Several papers—no books—bearing on laboratory or bearing on clinical phases of mental diseases, nervous diseases, such as spinal fluid tests, syphilis of the brain, and most recently a little paper on a kindred subject, from some research we are doing out at the University of Illinois.

Q. What is the extent of your practice in cases of obesity?

A. I have seen a large number of cases of obesity where the obesity was part of some other condition, part of some physical disease, glandular, or part of some mental disease. In the actual treatment of obesity cases, for obesity, very small.

Q. Are you acquainted with the United States Pharmacopoeia?

A. Yes.

Q. What is the dose of dried thyroid in the United States Pharmacopoeia?

A. Now, one grain.

Q. Are you familiar with the medical uses of thyroid substance?

A. Yes, with many.

Q. Have you in the practice of medicine used thyroid substance?

A. Yes, sir.

Q. To what extent and for how long a period of time have you used thyroid medication?

A. I usually use it in conjunction with other endocrine preparations, in persons who have thyroid deficiency or who have endocrine deficiency that I want to augment by giving thyroid. To what extent? Well, in dosage, it will vary from a fifth of a grain at a dose, usually using the U. S. P. doses on all drugs, averaging around three grains a day, and in certain cases have prescribed larger doses, up to 13 grains a day.

Q. Over what period of time have you used it?

A. On each patient?

Q. No. First, what period of time have you used thyroid medication in your practice?

A. Since I first began to practice, in 1914.

Q. Then how long a period of time on patients?

A. Sometimes a matter of several months.

Q. Is thyroid available to the public, doctor?

A. It is.

Mr. Hornibrook: The same objection, immaterial and irrelevant.

Exam. Averill: Objection overruled.

A. It is available to anyone at a drug store, the same as any other drug is available. It is usually sold by prescription, but not necessarily so.

By Mr. Cantwell:

Q. A child can go in and buy it?

A. Yes, sir.

Q. What is the history of the use of thyroid in medication and when was it first introduced?

A. The history of thyroid in medicine is very interesting. At first it was used in cases of cretinism. These cretins were children who had practically no thyroid gland substance in their own bodies. They were fed thyroid gland tissue that was dissected from the necks of food animals. The average dose was five grains and in some cases very remarkable results were established in these, so striking that thyroid made a terrific impression on the medical profession.

Now, as we look back on that, it seems quite likely that in some of these dissections the parathyroid

glands—several little bodies about the size of a pea—were not dissected away from the thyroid, and so these early cretins, I mean the cretins of about 1895, were given both thyroid and parathyroid substance.

They next tried to extract, with steam and other solvents, thyroid substance from the glands. That was not found to be very satisfactory.

They next developed methods of drying the gland without destroying the essential constituents, and that was dried or desiccated thyroid, and they seem to be still our popular remedies.

Dried thyroid was welcomed by the profession, because of its great effect on cretins, and large doses were given by men who believed in giving large doses and small doses were given by men who believed in giving small doses. But the pendulum swung to very small doses of thyroid, about one-tenth of a grain by many persons. Others regarded three or four grains very dangerous.

We have gotten over our awe about thyroid. We have been able to crystalize the essential substance of it so that now one grain is a conservative dose for an average person.

Q. When you say dose, you mean given how many times a day?

A. As a physician thinks best, an average of three. Possibly two, maybe four, possibly one, maybe five, but an average of three.

Q. And that would be one grain given three or four or five times a day?

A. As I say, three times a day.

Q. Now, will you describe, Dr. Hulbert, the variõus uses of dried thyroid substance?

A. Yes, sir. It is best used in cases where individuals have not sufficient thyroid for their health. Cretins, children without enough thyroid. Myxedama patients. Adults without enough thyroid. Cases of hypo-thyroid in adults, not severe enough to be called myxedema. It is also given in persons who have an average amount of thyroid, but where medically we think they should have a bit more, such as psoriasis, skin disease, in cases of obesity, some cases of glandular conditions. These three glands, the ovarine, pituitary and thyroid, when given medically, augment each other. A woman who has insufficient ovaries, for example she menstrates every six months, if we give her ovarine alone, she is only slightly

helped, but if we give her ovarine and thyroid, she is vastly helped. The same with pituitary.

That is the way I have given most of the thyroid that I have given, in conjunction with the other mentioned products.

Now, a person with under thyroid, a person with under ovarin, a person with under pituitary function, often will put on excessive weight, mostly fat, and we lean on them to distinctly improve the general health and reestablish whatever function we want to establish, like the mentrual function in women who do not function rightly. They lose weight. Any unspecified case, a case in general, of any drug, we think of the U. S. P. dosage for that drug.

Q. Have you ever heard of it being used or have you used it in heart conditions?

A. I have not used it in heart conditions. I do not take care of patients on heart conditions unless the mental condition is the outstanding factor. I have heard of it being used, and there it is used in small doses as a rule. By small doses I mean U. S. P. doses.

Q. Have you ever heard of it being used in dropsy?

A. Yes. To help stimulate the kidneys and start the sweating of the skin, to relieve the waterlogged condition of the individual.

Q. Dr. Hulbert, is thyroid safe for the public to use?

A. Yes, and so is any other U. S. P. drug safe for the public to use in U. S. P. doses where it is indicated.

Q. Is thyroid toxic?

A. No, it is not considered a toxic drug by the most of us. As I said, there were a few men fifteen or twenty years ago who felt quite a phobia about thyroid, but physicians have generally gotten away from that. It is a useful drug and is so regarded.

Q. It is a useful drug and not considered toxic by the medical profession?

A. No, it is not considered toxic. There are some dangerous drugs.

Q. But thyroid is not one of them?

A. No, sir.

Q. Is thyroid habit forming?

A. Thyroid is not habit forming and cannot be, for this reason: Habit forming drugs require larger and larger doses for the individual to get the effect, and habit forming drugs usually produce a false sense of physical comfort or sense of well being. Now, then, thyroid is not habit forming because there are some accompany-

ing actions—just how much we do not know, but there are some accompanying actions in taking thyroid. Therefore, we know we do not need larger doses. Taking too much thyroid does not produce a sense of well being but produces a sense of discomfort.

Q. You mean by overdoses?

A. Taking too much.

Q. Yes.

A. It produces discomfort. It cannot be habit forming.

Q. Do you regard obesity as a disease, doctor?

A. It is a disease and it is regarded as a symptom of deep-seated disease.

Q. Will you explain the use of thyroid in obesity, doctor?

A. The use of thyroid in obesity is to increase oxidation. In the oxidizing or burning—without flame—in the oxidizing or burning of tissue, the ordinary body activity causes considerable oxidation. The use of thyroid causes an increased amount of oxidation. Now, the oxidation of the tissues as augmented by thyroid means that certain tissues are consumed. To me, tissues which are consumed may be compared to a high test gas and a low test oil. Low test oil of itself will not burn. Body fats of themselves will not burn, but glycogen, blood sugar, is the high test substance of the body which is very easily oxidized.

Therefore, when an individual takes thyroid and increases his body oxidation, two things are consumed; the blood sugar or glycogen and the body fats. Now, the blood sugar content in an individual remains in an equilibrium or balance. There is about the same amount that stays in the blood most of the time. It remains rather constant. But the fats which are consumed are the stored fats. These stored fats are the excessive fats, the newly laid down fats, because the fats recently deposited in an individual are more watery, are of a little bit different constituency than the fats which have always been there, like the fats in bone marrow.

The net result then of thyroid medication is to increase the oxidation of fat; the sugar remaining constant.

Now, when the sugar supply seems to run low and the sugar reserve runs low, the proteid molecules of the body enter into it. We know a lot about the proteids and have much more to know that we know now. Among

the products of consumed protein we find nitrogen which can easily be traced, and we find glycogen forming.

So the effect of taking thyroid is to consume some nitrogen to supply glycogen. The nitrogen which is consumed, first, is the nitrogen which the body can spare. It is not tissue nitrogen as organized in the brain, the kidneys, the muscles, the heart muscle and so on, but it is recently deposited nitrogen. In order to preserve nitrogen against loss, it is advisable when taking thyroid to increase the nitrogen intake in the diet, protein intake.

Q. And will thyroid medication reduce obese people?

A. Thyroid medication tends to favor the reduction of obese people. Of itself it will not reduce every obese person. It tends to in every case, however. Other things being equal, such as exercise and diet, elimination, yes, thyroid will reduce obesity.

Q. Now, doctor, please discuss the dangers of the starvation diet.

Mr. Hornibrook: Just a minute. That is objected to as immaterial.

Mr. Cantwell: Oh, no. On direct examination of your witness you brought out the starvation diet proposition.

Mr. Hornibrook: I do not think the question of whether it is dangerous or not is in issue at all in this case.

Mr. Cantwell: One of their physicians said—

Mr. Hornibrook: The objection I see to it is that you are just simply taking up time and encumbering the record with matter which is absolutely irrelevant to any issue here.

Exam. Averill: Off the record just a moment.

(Discussion outside the record.)

Mr. Hornibrook: I wish to add to that objection the further objection that the witness has not qualified as an expert in the treatment of obesity cases. I object to this question on that ground and I wish the objection to stand as to all of this line of testimony, Mr. Examiner.

Exam. Averill: I cannot rule upon all of it standing. That depends on the question.

Mr. Hornibrook: I say as to this line.

Exam. Averill: I will, of course, consider the

question and will consider the objection raised as to this particular question. Off the record.

(Discussion outside the record.)

Exam. Averill: Gentlemen, until I have the opportunity to review the record, which I will do at lunch hour, I shall direct the witness not to answer the question at this time and will leave to the respondent to renew the question when we reconvene after lunch. You can examine the doctor now on some other line until then.

By Mr. Cantwell:

Q. Dr. Hulbert, I show you Exhibit 3 and direct your attention to the prescription of the preparation known as Marmola. You have had occasion to consider that prescription, have you not?

A. Yes, sir.

Q. State whether the use of that prescription by an obese person would reduce fat.

Mr. Hornibrook: Wait a minute now. We object to this question and to all of the questions along similar lines.

Mr. Cantwell: Why?

Mr. Hornibrook: For the reason that this witness is not qualified as an expert on the treatment of obesity. Neither has he qualified as an expert in the use and effect of the drug known as desiccated thyroid.

Mr. Cantwell: It is clear, your Honor, that he has, under his previous testimony. He says he has treated obesity cases, not a great many, but he has treated them, that he has used thyroid substance since he has been licensed to practice medicine, that he has used it with other glandular substances, and from his knowledge, education and training, he has He knows its effect on the human body.

Exam. Averill: I will say, gentlemen, that before I let the witness answer that particular question, I would like to ask the witness one or two questions.

By Exam. Averill:

Q. Doctor, have you in the course of your medical practice had occasion to treat obese patients suffering from obesity?

Harold S. Hulbert

A. I have treated patients with obesity, yes, sir.

Q. In the course of that practice have you had occasion to use thyroid as one of the remedies for cases of obesity?

A. I have, often.

Q. You have?

A. Yes, sir.

Q. And of course I take it from your previous testimony that as a physician you have had occasion to study the literature in connection with and recorded the results and so forth of the use of thyroid in the various cases in which it is used?

A. I have studied it considerably, yes, sir.

Exam. Averill: It seems to me, gentlemen, from those answers the witness can answer that question. The objection is overruled. The reporter will read the question to the witness.

(Question read as above recorded.)

A. This combination of thyroid, cascara and phenolphthalein, according to the directions here, will reduce fat.

By Mr. Cantwell:

Q. Would the laxative content in this prescription known as Commission's Exhibit 3, the Marmola prescription, cause a person taking it in the dosages according to the instructions in the booklet for sixty to ninety days, to contract the laxative habit?

A. No.

Q. Will you give the reason for your answer, Dr. Hulbert?

A. When an individual takes thyroid medication to augment his own thyroid production, he increases his own metabolism. That is the consumption of tissue. A great deal of that is thrown out through the lungs and some of it is thrown out through the bowels. The net result is that when a person takes thyroid he is throwing a greater burden on his bowels than he has previously.

By Exam. Averill:

Q. How about the action of the other two drugs?

A. So with this greater burden on the bowels, the use of mild laxatives is indicated, and when he stops taking the thyroid, and he stops taking the laxatives,

there is no longer the need for laxatives, because he is no longer overburdening his bowels.

By Mr. Cantwell:

Q. In other words, where the person would take thyroid, it would be better for him to take some laxative with it.

A. When a person takes thyroid, he should make a greater effort to see that his bowels are open.

Q. Doctor, would the administration of this preparation in dosages of one tablet four times a day be dangerous to an average person?

A. It would not, because these are all U. S. P. drugs and less than U. S. P. doses, and to the average person it is not dangerous.

Q. Doctor, you have seen the instruction booklet which is enclosed with each Marmola package.

A. Yes.

Q. Doctor, in your opinion, will the taking of this remedy in accordance with these instructions and advice be effective in reducing obesity?

A. This remedy along with the advices that come with it will be effective.

Q. Doctor, in your opinion, in will the taking of this remedy in accordance with the instructions and advice be safe?

A. Oh, yes, it would be safe.

Q. Doctor, in your opinion, will the taking of this remedy according to these instructions and advice act with uniformity upon the users thereof?

A. It will act with uniformity in that it would tend to reduce them.

Q. Doctor, it has been said in this hearing that thyroid is a drug that is more dangerous than strychnine. Do you concur with that statement?

A. No, I do not.

Q. Will you state your reasons?

A. Strychnine is a drug which is fatal in one grain doses. This is a drug which is very helpful in one grain doses. We do not know the dosage of this which would be fatal.

Exam. Averill: Wait a minute. I do not catch that. Let us get that right. Will you read that?

(Answer read as above recorded.)

Exam. Averill: That "this." You see, this

record may be read by others. I understand what you mean by "this," but I would rather you say what "this" is.

The Witness: Yes.

Exam. Averill: I mean specify. It will be clearer for those who have to read the record later.

The witness: Thyroid is helpful in one grain doses.

By Mr. Cantwell:

Q. You started to say that nobody knows—

A. Nobody knows what the lethal dose or the fatal dose to a healthy human is of thyroid.

Q. What is hypo-thyroidism?

A. Hypo-thyroidism is a diseased condition of the individual where there is insufficient thyroid substance made by his own body.

Q. Is there more than one type of hypo-thyroidism?

A. In juveniles, yes. That is, cretinism. In adults, myxedema, or to a less extent or a mild extent the disease we call hypo-thyroidism. It has its own characteristic symptoms and is treated by giving thyroid to the individual.

Q. Are there glandular types of obesity?

A. Yes, there are. Pituitary obesity, underfunctioning of the pituitary gland; ovarine obesity, or underfunctioning of the ovaries. Rarely there is a similar condition in males called eunuchism, the underfunctioning of the thyroid. All of these leave a deposit of fat on the body.

Q. And thyroid medication is used?

A. I use it in all three types, pituitary, ovarine and sub-thyroid states.

Q. Dr. Hulbert, what is the treatment for obesity?

A. The treatment for obesity by doctors is to diminish the diet, particularly diminishing the fats and sugars, and, if necessity, giving some thyroid. The treatment the people prefer is the taking of thyroid and continuing to eat or moderately diminishing their appetite. The only difference between the scientific man and the layman is where we put the stress. We put the stress on dieting. The layman puts the stress on drugs. In the treatment of obesity, the individual may be a bit more active, but he does not need to indulge in violent exercises. The treatment of obesity also means that the elimination functions of the body are working well. He does not need drastic cathartics, but he should keep

the bowels open. The skin should be kept clean so that sweating is easy and the respiration should be full. Thyroid medication tends to cause increased sweating, increased breathing, but does not of itself cause an increase of the bowel movements.

Q. What size dose of thyroid should be given in the treatment of obesity?

A. In an unspecified case the dose is the U. S. P. dose.

Q. And that is one grain three or four times a day?

A. Three or four times a day, an average of three.

Q. Does the average obese person have a normal thyroid?

A. Yes, I suppose he has. He has a normal metabolic rate. That is a test of a thyroid function.

Q. How much thyroid substance is made a day in an individual's own body?

A. We think about a grain and a half. I mean that the individual makes about the same amount of thyroid substance that we find in a grain and a half of desiccated thyroid.

Q. What are the causes for obesity?

A. The greatest cause is overeating, especially of starches and sweets, accompanied by under exercise. The next greatest cause is glandular cases, under functioning of the thyroid gland, pituitary gland or ovarine gland. Those are common causes of obesity.

Q. What drugs are regarded as dangerous drugs?

A. There are three types of dangerous drugs. One is habit forming drugs, of which morphine and heroin are examples. That is the group that is listed in the dangerous drugs act of Great Britain and the League of Nations, habit forming drugs.

The third group of dangerous drugs are those drugs which would be poisonous in amounts in which they might be taken. That includes alcoloids like strychnine. It includes metals like arsenic. It includes corrosive poisons like carbolic acid.

The third group of dangerous drugs are those drugs which would be suicidal or contraseptive, if there are such.

Thyroid is not a habit forming drug. Thyroid is not poisonous in ordinary doses. Thyroid is not contraseptive. It is not regarded as a dangerous drug.

Q. How much desiccated thyroid would be necessary to raise the basal metabolic rate plus 25?

A. That is estimated by some experiments done on

persons without adequate thyroid substance, myxedema patients, at forty grains.

Q. And how much desiccated thyroid would be necessary to raise the basal metabolic rate to plus 10?

A. Sixteen grains, by the same figuring.

Q. A two grain dose of desiccated thyroid will raise the metabolic rate how much?

A. Between one and two points. 1.2, if our figures are correct.

Q. And a half a grain dose would raise the basal metabolic rate how much, a half a grain dose of dried thyroid?

A. 0.3.

Q. What is meant by a toxic dose of a drug or combination of drugs, doctor?

A. A toxic dose or combination is the amount of drug or combination which poisons the individual.

Q. And how much thyroid would a toxic dose be?

A. It would be enough to cause over-thyroidism. That is, hyper-thyroidism, and we find that hpyer-thyroid patients have a basal rate of over 25. Therefore, I figure that a toxic dose of thyroid, dried thyroid, would be enough to cause a basic rate of plus 25, namely, 40 grains.

Q. That would be over forty grains?

A. Forty grains or more, by these figures.

Q. You say that a hyper-thyroid person has a basal metabolism of plus 25. How far upwards does that extend?

A. Well, it goes on to plus 100 or more. We divide it into groups. Twenty-five to 40 is a mild hyper-thyroid. Forty to 60 increase of basal metabolic rate is a moderate hyper-thyroidism, and over plus 60 is a severe hyper-thyroidism.

Q. Is thyroid medication helpful in alimentary obesity?

A. Thyroid medication is very helpful in alimentary obesity, because it oxidizes the recent deposits of fat which these overeating people deposit.

Q. Doctor, is a half a grain of thyroid given four times a day to obese persons who are otherwise healthy except for their obesity a toxic dose?

A. No, it is not a toxic dose. A toxic dose we figure to be over 40 grains, and this is two grains.

Q. What is meant by idiosyncrasy?

A. Idiosyncrasy means that the individual is chemically sensitive to some substance to which ordinary per-

sons are not sensitive at all, and when he eats or touches this substance he gets sick. The sickness may show itself in the skin, like in hives, or angioneurotic edema. It may show itself in the lungs, as in hay fever or asthma. It may show itself in a sudden rise in temperature. It may show itself in unconsciousness or convulsions.

Q. And there are many articles of food and diet proteins to which such people are hypersensitive?

A. There are. Such commonplace things as cow's milk or white bread or pollen from roses, or from ragweed. Many, many such things. These persons that are sensitive are the minority in population.

Q. A very small minority?

A. I do not know. I would make an estimate of about four per hundred thousand. It is very small.

Q. What is your opinion as to the effect of thyroid medication on the nervous and mental system?

A. The effect of thyroid medication is quite a tonic to the nervous system of a great many people. It makes them more alert. It makes their minds keener. To that extent it is helpful. To some persons thyroid medication will produce tremors or we find tremors of the hand and tongue if the dose is too large for the indication. I have never seen tremors produced unless the patient took over five grains of thyroid several times a day for some time.

Q. Doctor, have you given thyroid as a tonic in your practice to certain types of people?

A. Yes.

Q. In what types of people who use it as a tonic?

A. Persons who are understanding in their thyroid or persons whose life is very stabalized and in a rut, quiet, too sedentary, and we want them to activate their own chemical processes. We cannot get them to exercise. There we give small doses, generally given several times a day.

Q. Will thyroid medication in U. S. P. doses or less than U. S. P. doses lead to hyper thyroidism?

A. It cannot. Hyperthyroidism is due to the patient's own thyroid becoming diseased. When an individual takes thyroid medication, the tendency is for his own thyroid gland to relax just that much, like leaning on a crutch. The net result is that a person taking thyroid medication in U. S. P. doses is letting his own processes underfunction rather than making them overfunction.

Harold S. Hulbert

Q. Is thyroid medication ever used in certain cases of dropsy and heart trouble?

A. I understand it is.

Q. Is there an interrelation with the other glands of the thyroid gland?

A. Very close. Thyroid, pituitary and the ovaries are closely connected chemically or by the sympathetic nervous system.

Q. And you said that thyroid is necessary in glandular obesity as a treatment?

A. I think so, as a rule, yes.

Q. Dr. Hulbert, would the administration of this Marmola prescription in doses of one tablet four times a day be dangerous to an obese person?

A. No, sir, there is nothing in it that would be dangerous to an obese person.

Mr. Cantwell: Cross-examine.

Cross-examination by Mr. Hornibrook:

Q. Doctor, you have been employed by the respondent in this case as an expert, have you?

A. Yes, sir.

Q. You have traveled around at the various hearings, attending them all, have you not?

A. I suppose so. I was here at these hearings and went to Washington at the hearing there.

Q. Yes, the two here and one at Washington.

A. Yes.

Q. How many cases of obesity have you treated during your practice, doctor?

A. I suppose I have seen several hundred. I could not say how many, because in large asylums where I have been there are a great many cases of obesity, in what we call the fat wards.

Q. You have seen them, but how many have you treated?

A. They would be under my treatment, whether I treat them for obesity or not. I treated the most of these obese insane by trying to increase their exercise, get the attendants to keep them busy, not let them sit around so much, and also tried to restrict their diet, not to gulp their food and steel other patients' food. But the scientific treatment of obesity would have to be among my private patients where they are intelligent enough to cooperate.

Harold S. Hulbert

Q. How many of those private patients have you had?

A. I want to amplify that last answer.

Q. Yes.

A. At the University of Illinois we have an environment which is scientific. But among my private and dispensary patients, where obesity was a factor demanding attention and treatment, it is difficult to say. I suppose around forty, sixty. I am not sure. Patients do not come to me primarily for obesity.

Q. I did not get that. How many did you say?

Exam. Averill: Forty to sixty, he said, but that the patients did not come to him primarily for obesity.

By Mr. Hornibrook:

Q. In the treatment of obesity it is your practice to first subject the patient to diet?

A. Diet and exercise.

Q. And then if you find the patient not responding, you use some thyroid, is that true?

A. Not exactly that. If I find some glandular condition contributing to the obesity, then we treat the glandular condition.

Q. You would not treat an obese person with thyroid unless you found a glandular condition there which was contributing to the obesity?

A. Personally, no, because when a person is merely obese and there is no sympathetic nervous system or endocrine condition, I would pass the patient on to a dietician.

Q. Now, the cretin that you speak of, he has no defective glands, has he?

A. His gland—

Q. Wait a minute. He has defective glands, has he not?

A. Yes. That is our concept.

Q. Yes.

A. His gland is underfunctioning very markedly.

Q. So that in the case of a cretin he would be able to take more thyroid without bad effects than the normal person, is not that true?

A. I think so.

Q. And is that not true with the hypothyroid person?

A. I think so.

Q. And is not that true with the myxedema person?

A. Undoubtedly there.

Q. So that when you say it takes 40 grains to raise the basal metabolic rate to 25 points, you refer in that case to the patient afflicted with myxedema, is that true?

A. Yes.

Q. It would not take near as much as that to increase the basal metabolic rate to 25 points in the normal person, would it?

A. I do not agree there. It is only in the myxedema or hyper-thyroid person that we can estimate how much thyroid it takes to raise the B. M. R. and we assume it is the same in all persons but we could not measure it in the healthy person.

Q. I do not understand that. Cannot you measure the basal metabolic rate in a normal person?

A. Yes, you can do that.

Q. Then cannot you tell how much it will take of thyroid to raise it to 25 plus?

A. No, sir, because in the normal person there is too much fluctuation in the course of a day from the activities of his own gland. We can only measure how much it takes in the person whose gland is not functioning.

Q. You know that the myxedema patient and the hyperthyroid patient and cretin patient can take as much as 40 grains before it reaches the danger point or 25 plus?

A. No, it raises it 25 points.

Q. You call that the danger point?

A. No, it raises it from whatever it might be to 25 points more, but from a healthy person to raise from normal to 25 points above normal would bring on a state which we regard as mild hyperthyroidism.

Q. What do you consider the 25 points, the raising of the metabolic rate to 25 points? Is that the danger point?

A. If it is 25 points above normal—let me try to explain. Assuming a myxedemous person has a basal rate of minus 40 and we raise it 25 points. We now has a basal rate of minus 15. That is not dangerous. But you take an ordinary person with a basal of normalcy and raise it 25 points, up to plus 25, then we think of hyperthyroidism.

Q. And that is dangerous?

A. Yes, hyperthyroidism is significant.

Q. Is not cretinism and myxedema comparatively rare?

A. I think so. We do not see many.

Q. Let me understand you. Is it possible for you to

determine, or has it been determined how many grains of desiccated thyroid it will take to raise the basal metabolic rate to the danger point?

A. Of the normal person?

Q. Of the normal person.

A. It has not been determined as far as I know. I do not think it could be.

Q. Suppose the thyroid gland was producing an oversupply of thyroid?

A. Yes.

Q. Would it not be improper to administer thyroid in a case of that kind?

A. It depends on how much oversupply he has and how much the patient needed and how much he is overeating, but as a general rule, I would say yes, but the variables there would have to be specified before I could make a definite answer.

Q. Will you give the variance there that you have in mind?

A. How much is this person overeating at the time he is taking thyroid; how much is he overexercising or is he resting? It is awfully hard to answer that conclusively without the variables which you might have in mind.

Q. So if he is overeating and underexercising and he has a thyroid gland that is producing a greater amount than it should and you should give that patient thyroid remedy, that would not be proper, would it?

A. It would make him reduce.

Q. It would make him reduce, but would it be more injurious to him?

A. It would depend on how much his gland is overfunctioning. If his gland is overfunctioning three or four per cent, it would not hurt him to take the U. S. P. dosage.

Supposing it was overfunctioning 15 per cent.

A. Fifteen per cent?

Q. Yes.

A. If he had a b. m. r. of plus 15, I do not think it is good practice to feed him thyroid.

Q. Sometimes the thyroid gland does produce over 15 per cent, does it not?

A. Yes, it does.

Q. I mean by that, 15 per cent more than normal.

A. Yes. We are taking the b. m. r. as the normal of it.

Q. And sometimes the thyroid gland will raise it?

A. Yes, sometimes.

Q. And the ratio of danger will increase the overproduction increases and the amount of thyroid you gave to the patient increases, would it not?

A. Yes, the results on the individual would be proportioned on how much more you gave him.

Q. Yes.

A. If you want to consider it dangerous or not would depend on—

Q. Refer now to the testimony of Dr. Tenney this morning with reference to the operations that cause death.

A. Yes.

Q. It would be possible in the cases of persons whose thyroid gland was producing a great amount, more than normal, that if you gave that person a very heavy dose of thyroid it would be liable to kill the patient, would it not?

A. Well, Dr. Tenney said that these patients had a toxic thyroid. There are not overfunctioning thyroids. The stuff which is made by these toxic patients is not only mere thyroid secretion, but it is chemically altered. It is not the pure thyroid secretion that we make. It is an altered stuff. So I do not think that giving thyroid medication would be fatal even in a case—I am assuming now the U. S. P. dosage—in a case of overthyroidism, say, with a basal metabolic rate of 25 per cent. I do not think it would be dangerous. But I do not say that it is advisable.

Q. Do you maintain that you could not give thyroid enough to a person who had a thyroid gland that is overproducing to cause death?

A. It might be. I do not know what the amount would be, probably up in the hundreds.

Q. When an obese person comes to you, what sort of a physical examination do you subject him to, if any?

A. If any?

Q. Yes.

A. Routine medical physical examination of heart, blood pressure. I customarily put him through the Wasserman test, and blood physics to get the blood count. Urinalysis; topical examination, examining different parts of the body like the eyes, nose, heart, mouth, and so on, and pay particular attention to the location of fatty deposits. The examination is modified by the history the patient gives. The examination in my cases is always supplemented by nervous and mental examinations.

In fact, that is where I put my stress. If there seems to be any indication to me of pituitary obesity, I usually supplement it with laboratory tests, one being the X-ray of the sella turcica, the little bony cavity in which the pituitary rests, and also a glood sugar tolerance test, which estimates the pituitary function.

Q. Is it not a fact, doctor, that obese persons have a predisposition to diabetes? Perhaps I have not used exactly the correct term, but is it not —

A. I understand the thought. I have no such knowledge. I do not know, sir.

Q. Would the giving of thyroid be proper in a case of diabetes?

A. It would be superfluous. It would not help the paitent any. It would not hurt them seriously. It is not a good remedy for diabetes.

Q. Now, in your practice, doctor, assuming that a person came to you for treatment for obesity, would you prescribe without a physical examination two grains a day of thyroid for a period of sixty to ninety days to that patient?

A. I can only answer that in these ways, Mr. Hornibrook that if that patient actually comes to me, of course I examined him, but if some doctor or student asks me about a case and describes it to me, I will say, "I think that child should have either pituitary or thyroid," if he is a cretin, and estimate the percentage.

Q. Wouldn't you want to know the condition of the patient's heart?

A. Unless I am told to the contrary, I assume the average in all cases.

Q. I believe you said you had little experience with heart afflictions.

A. I do not nowadays treat heart diseases, unless the patient is also afflicted that is under my care.

Q. In the case of myocarditis, doctor, is the administration of thyroid drug a proper thing?

A. It depends on the type of myocarditis. If the heart muscle cells are of themselves sick and impaired, I would not give thyroid. If it is what we call a fatty myocarditis, where the fat is infiltrated and is located in between the heart muscle cells, like we find in some of the beer drinkers, then thyroid would be as indicative there as in other cases, but it would help to do away with the excess fat. It depends on the case. You cannot generalize it.

Q. Taking the first symptoms of myocarditis, which you have just described, how does that manifest itself?

A. It may show itself by irregular heart action, or it may show itself by low blood pressure.

Q. If it showed itself—

A. It would not show itself or it would not be likely to show itself, fatty myocarditis, in a person of ordinary build and structure like we are.

Q. If it showed itself in the case of blood pressure, there would be no way in which the low pressure person could determine that for himself, would there?

A. An individual cannot determine if his blood pressure is correct. He merely feels asthenic and weak, a lack of endurance.

Q. You have apparatus for determining that yourself?

A. Oh, yes.

Q. Is not a fatty heart a weak heart, doctor?

A. Weak?

Q. Yes.

A. I think it is an embarrassed heart, yes.

Q. Does not thyroid always increase the action on the heart?

A. If you take enough. That is one of the signs that you are getting effect, that it increases the pulse rate. Therefore, it would be a good thing to give to these fatty hearts, to make the heart exercise, and thus do away with some of that excess fat.

Q. Is not it a well-known rule among physicians not to increase the heart action in cases of fatty heart?

A. It is all a matter of degree. If we can relieve the embarrassment that the fat produces without overtaxing the heart grossly, it would be helpful to give enough thyroid. To raise the pulse rate 30 to 40 a minute would be bad, yes.

Q. Is it not a fact that when you come in contact in the treatment of an obese patient with a fatty heart, is it not necessary that the doctor watch that heart very carefully and make several examinations during the period that he is administering thyroid?

A. Not necessarily. It may be advisable, but a person who comes, who is obese, and has a fatty heart, he is usually very indolent. When he does exercise, like walking up a flight of stairs or running for a trolley car—I mean unusual exercise, more than the ordinary run of the day's events, his heart beats very rapidly and he feels it. He is heart conscious. I do not think he is prone to die from heart disease because he walks upstairs and

his heart beats faster. The exercise for such a person should be gradual exercise, not spurts of violent exercise.

Q. But you as a doctor, if an obese person comes to you and you find he has fatty heart, you would not think of administering two grains of thyroid to that man for a period of sixty days, two grains a day, without calling him in and examining his heart, would you?

A. First I would stop his drinking and overeating.

Q. Supposing he did not drink and supposing he did not overeat. There are such conditions as that, aren't there, and still a man have a fatty heart?

A. Yes, I suppose there are.

Q. Yes.

A. I would advise him about his hygiene first of all.

Q. But you would not give that fellow two grains of thyroid for sixty to ninety days without calling him back and examining his heart, would you, doctor?

A. I doubt whether as a rule I would give him thyroid at all. I would try to regulate that case by hygiene.

Q. Are there not some kidney diseases also in which you would not use thyroid?

A. I do not think I would use thyroid medication in an uncomplicated case of high blood pressure.

Q. And in such a case you say there is no way in which the man can tell whether his blood pressure is high or low?

A. I can only tell of patients who come to me, who are wasting rather rapidly with Bright's disease who are not obese. They tend to lose as the blood pressure goes up, say to 200 or 220. A recent case that I have seen—I am not mentioning it as typical, but it came up recently and I simply recall it—she had lost forty pounds in about two months, so thyroid is not indicated in those cases. They would not ask for it. I would not be apt to give it. They are not obese as a rule.

Q. But they may be.

A. I say as a rule. They might be.

Q. What about an interstitial type of nephritis?

A. Interstitial nephritis means not where the secreting parts of the kidneys are involved, but the connective tissue that supports it, like the mortar between the bricks. If given thyroid it probably would improve the circulation in the kidney itself. I do not know enough to say whether it would be helpful or hurtful in those cases.

Q. How about hardening of the arteries? Would you give it in a case of that kind, doctor?

A. I have not given it in cases of hardening of the arteries, for that condition. I think thyroid should be restricted to cases of obesity or glandular disorders, mostly. We do not give thyroids in a lot of these ordinary conditions. I do not know whether it would be indicative or contraindicative.

Q. Is not hardening of the arteries frequent in obese cases?

A. No, not quite to the contrary. Those persons usually have an inactive, sluggish heart, a low blood pressure.

Q. Does not overeating itself cause hardening of the arteries?

A. In some cases. The causes of hardening of the arteries are so varied. The most common cause, we believe, is chronic infection of the body, like chronic gall bladder, or chronic sinus, or teeth. That, we think, is the most common cause of persons suffering that way. And that condition is not ordinarily associated with obesity.

Q. How about chronic prostatities in old men?

A. That is found both in the obese and ordinary person. It is also found in persons losing in weight, and there is no direct relation between obesity and chronic prostate infection.

Q. In an obese case of that kind would you give thyroid?

A. No. When a person has a predominant symptom or disease that has nothing to do with obesity, then we treat that disease. If he has as a concomitant with it obesity, we consider that a minor affliction and do not treat it until after we have treated the essential thing.

Q. But the laity would have no means of knowing what that affliction was, would they, where the patient was obese?

A. I think the average man who has prostate disease knows he has trouble in his pelvis, and he does not regard it as a part of his obesity. It is a very annoying condition. It attracts attention. He may not diagnose it, but he knows he is not well.

Q. But if he took thyroid, that would not be proper, would it, during that period?

A. I think he would very quickly discontinue it, because one of the effects of thyroid is to increase the amount of urine secretion, and that is a big problem in these prostate cases. It would not be likely that a man who is obese and has a prostate condition would take

any such remedy as this for three months. He would not do it.

Q. But if he did take it, it would be injurious to him, would it not?

A. It would be mighty inconvenient. I would not say injurious. It would be very discomfortable.

Q. Now, doctor, the drug phytolacca or pokeroot as found in the remedy Marmola, that is a powerful drug, is it not?

A. It is beyond my ken. I do not know anything about it. I regard it as inert. That may be ignorance on my part, but I would regard it as inert. Looking over that formula, I only saw three things that struck me as potent.

Q. You would not call that a scientific formula, would you, doctor?

A. Any combination of thyroid and cascara and phenolphthalein in U. S. P. doses for a condition which the U. S. P. and the doctors claim as indicative, I would call that scientific yes.

Q. How can you say it is scientific when one of the drugs there, pokeroot, is beyond your ken, you know nothing about it?

A. The things we do know about are things which we scientifically establish. I do not infer favorably or unfavorably, because I do not know about it. Just what I know about it. The reason I consider this formula scientific is that the dosage here is according to our accepted concepts of what a dose should be, approxmately a U. S. P. dose.

Q. But now, doctor, when you speak of what your conception is of what a dose should be, you mean by that that the dose is proper if it is administered under the direction and advice of a physician, after a careful examination?

A. No, I do not, sir. I mean the proper dose of any drug is the dose which the doctors have found to be effective in conditions for which that drug is indicated, not whether the patient has been examined, but whether the dose is the right size dose for the diseased condition.

Q. If that be true, and it is not necessary to make these examinations at all, why do not the doctors step aside and let us have these accepted proprietary remedies for all diseases? Of what use are you doctors, anyway?

A. That is a much disputed question, and our view-

point is this: Mainly, we are to diagnose conditions and outline treatments. We are to keep patients to alive and bring comfort to them while they live. This cannot be well done by proprietary remedies in serious diseases, but where anyone will take a burden off our shoulders in minor conditions, we are very much obliged to them for it. We can then concentrate on scientific medication in serious cases.

Q. I did not mean that as disparaging to the medical profession. I have every respect in the world for it.

A. And we have for the law.

Q. I was trying to bring out from you that thyroid and all drugs should be administered, if administered safely, under the direction of a doctor, is not that a fact?

A. That is not the fact, sir. The intelligence of the American population is so great that they could administer to themselves in a lot of things and be safe and helped. We are trying to educate them all of the time, both in the matter of hygiene, like boiling your water, and in matters of personal hygiene, like keeping your mouth clean and the use of ordinary oil sprays, using standard drugs for minor ailments. It is not necessary that drugs be administered by doctors only in all matters. In serious conditions, yes, and diagnosis most of all, doctors are necessary.

Q. I will ask you personally if you would give desiccated thyroid to an obese patient, two tablets a day for a period of sixty to ninety days without making some examination of that patient?

Exam. Averill: What do you mean by tablets? You said two tablets.

Mr. Hornibrook: I meant two grains a day.

A. You mean half a grain four times a day or two grains a day?

By Mr. Hornibrook:

Q. Yes.

A. The answer is that I never have and probably would not.

Mr. Hornibrook: That is all.

Mr. Cantwell: Just a couple of questions on redirect.

Redirect Examination by Mr. Cantwell:

Q. Would a person producing over 50 per cent or 25 per cent of thyroid substance be an obese person?

A. A person with a metabolic rate, basal metabolic rate of—

Q. Of 15 plus or 25 per cent plus, be obese?

A. Not at all likely. That would be a very rare exception.

Q. Now, on the question Mr. Hornibrook asked you about the fattyheart case, you said that you would regulate that by hygiene first. Now, if you could not regulate the fatty heart case by hygiene, you would probably give thyroid, would you not?

A. No, I would probably give heart remedies next, and if that was not satisfactory I would cast around for something that would be unusual, maybe thyroid.

Q. Maybe thyroid?

A. But the point is, we stress hygiene and diet control, and if the patient wants it, thyroid or some easy remedy. Both are properly given.

Mr. Cantwell: That is all.

Exam. Averill: Gentlemen, one moment. I do not want to force this witness to return here, but if the answer to that question or ruling at least upon that question is deemed to be important by the counsel propounding the question, I shall have to ask the gentleman to come back. It depends entirely upon whether counsel considers a ruling on that question is or is not important.

Mr. Cantwell: We will withdraw if, it your Honor please.

Exam. Averill: That settles the matter, and the doctor is excused.

(Witness excused.)

Exam. Averill: We will recess now until 2:30.

(Whereupon, at 1:30 o'clock P. M. a recess was taken until 2:30 o'clock P. M.)

Chicago, Illinois, October 26, 1928.

Met pursuant to adjournment, 2:30 P. M.

Before:

Edward M. Averill, Examiner.

Appearances:

Edward J. Hornibrook, for the Federal Trade Commission, Washington, D. C.

R. M. Connors, 560 Equity Building, Detroit, Michigan; Rockwell Gust, 2214 First National Bank Building, Detroit, Michigan, and Robert E. Cantwell, Jr., 1105 Hartford Building, Chicago, Illinois, for the respondent.

GEORGE W. FUNCK, was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct Examination by Mr. Gust:

Q. Will you please state your name.

A. George W. Funck.

Q. And your address.

A. 5323 Arthur Avenue and my office, 25 East Washington Street.

Q. You are a practicing physician in the city of Chicago?

A. Yes.

Q. And when did you graduate?

A. I graduated from the University of Wisconsin 1899, and I did one year's post graduate work at that institution and Rush Medical College in 1903.

Q. What hospitals have you been connected with?

A. I am at the present time President of the Southwest General Hospital, which is in process of construction and which we expect to complete about three weeks from now.

Q. Do you specialize in your practice?

A. Yes, in internal medicine.

Q. Do you have occasion to treat obesity?

A. Yes.

Q. What has been the extent of your experience in the treatment of obesity?

A. Well, such as comes to the internist in the treatment of other ailments, and also in the treatment of individuals who come directly for the purpose of reducing.

Q. Might I ask you about how many obese patients you have treated in your practice?

A. In the course of twenty-five years—well, I have never counted them, but some hundreds.

Q. Are you familiar with the product known as desiccated thyroid?

A. Yes.

Q. Have you had occasion to use that in your practice?

A. Yes.

Q. And for how long have you been using that product?

A. Practically ever since I have been practicing medicine.

Q. Are you familiar with its action upon the human body?

A. Yes.

Q. Have you had occasion to observe its action from time to time on various patients?

A. Yes.

Q. Have you had occasion at various times to study and read the literature about the action of that product?

A. Yes.

Q. Do you use desiccated thyroid in the treatment of obesity.

A. Yes.

Q. And for how long have you been using it in that treatment?

A. Oh, twenty years, or possibly more.

Q. What is its action, Doctor, on the obese patient on whom it is administered?

A. It increases the rate or speed of the metabolism, and by increasing the speed or rate of metabolism, it reduces weight.

Q. Is that a uniform action upon obese people?

A. Yes, it increases the speed or rate of metabolism, not only in obese individuals, but any individual who takes it.

Q. Are you familiar with the dosage of this desiccated thyroid as it appears in the United States Pharmacopoeia?

A. I am.

Q. What is the amount of it?

A. In the present Pharmacopoeia, the average dose is stated to be one grain. That is the tenth revision. In the ninth revision, it was a grain and a half, and in the eighth revision it was four grains.

Q. Now what has been the range of dosage you have administered in the treatment of obesity?

A. Well, just about what the Pharmacopoeia states I believe is correct, but this is an average dose and usually what we start with is the average dose and then increase the amount.

Q. By that you mean you give it in one grain dosages, three or four times a day?

A. Yes, some times more and some times it may be less.

Q. Doctor, are you familiar with the formula of Marmola as it appears in Commission's Exhibit 3?

A. Yes, sir.

Q. Doctor, in your opinion, can the Marmola tablets, compounded according to that formula, be taken by the average obese person four times a day for a period of sixty to ninety days without harm.

A. If the person is obese, it can be done especially if the rest of the directions that are laid down in this booklet are adhered to.

Q. Doctor, you notice in that prescription some laxatives.

A. Yes.

Q. There is cascara and phenopthalein.

A. There is extract of cascara sagrada, a quarter of a grain of that and a quarter of a grain of phenopthalein.

Q. What would be the action of those drugs?

A. The action of cascara is a mild laxative, and the action of phenopthalein is likewise a mild laxative. Given in average doses either one of them is a mild laxative, but given in the doses as prescribed here, I doubt whether it would produce very much of any action, because the average dose of extract of cascara as given by the United States Pharmacopoeia, and we take that as representative, is five grains. The dose given here in each tablet is a quarter of a grain. That means that the patient is getting about 1/20 of the average dose, and I consider that very small, especially in view of the fact that cascara is a mild laxative to begin with.

In the tenth edition of the Pharmacopoeia I believe the average dose of phenopthalein is given as 2½ grains, and there is in this prescription here ¼ grain, which would be about 1/10 of the average dose. So in my opinion, the doses that are given in this prescription here are very, very mild, and probably in the average individual, he would know whether he had a laxative or not. Probably it would not be any more than the administration of a fig or two, or maybe a prune, very small.

Q. Doctor, in your opinion, would the administration of Marmola tablets four times a day for a period of sixty to ninety days cause the patient to have a laxative habit?

A. No, I don't think so, because in the first place,

cascara is administered by physicians as a cure for chronic constipation, as a cure rather than to aggravate chronic constipation, and it is so small that I don't know whether it would have much of a curative effect or not. I think the same thing can be said about pheonopthalein. It certainly would not put the patient in a condition where he would have to use laxatives to get a bowel movement.

Q. Will you state whether or not, in your opinion, the use of that prescription by an obese person would reduce his obesity?

A. Yes, the thyroid will increase the basal metabolic rate and so will tend to produce reduction, provided, of course, always that the patient does not increase his food intake by as much as the basal metabolism is increased by the thyroid, or if he stops moving around, becomes very sedentary when taking this, more sedentary than he has been previously, that might counteract the affect of the thyroid, or rather not counter-act, but nullify it.

Q. I understand, Doctor, that in the treatment of obesity it is customary to do three things, reduce the diet, maintain, or possibly increase the exercise, and give thyroid medication. Is that your practice?

A. These are the fundamental principles upon which the treatment of obesity is based.

Q. And you use in your own practice thyroid medication in the reduction of obese persons?

A. Yes.

Q. Have you found it necessary in all cases to give the patient a basal metabolism test before administering the thyroid?

A. That is a very interesting thing to do and it is very expensive too, but it is not essential, because the basal metabolism machine is a comparatively rough estimation of the patient's metabolic rate. It is usually considered that if on the basal metabolism machine, he should be ten points above or below normal, we consider him normal because the error of the machine is considered to be about ten points, so a normal individual if absolutely normal will have a basal metabolism rate of 100 and it is also considered he is still normal if the basal metabolism machine shows 90, and he is still considered normal if it shows a rate of 110. That really is a variation of 20 points in there, so that most of the obese persons we actually treat come within that range. There may be one or two or three points below normal, but this machine would hardly show that. It is subject to that much error. It is an interesting thing to do, but it is not essential.

Q. Doctor, you know what is called the disease of condition of hyper-thyroidism.

A. Yes.

Q. What is that, Doctor?

A. Hyper-thyroidism is a condition in which the thyroid glands secrete more than the average amount of their internal secretion. If the gland secretes more than the normal amount, we speak of it as being hyper thyroid, and the reverse is also true if the patient's gland is secreting less than the normal amount, we speak of it as being hypo thyroid.

Q. Are persons suffering from hyperthyroidism obese?

A. The hyperthyroidism tends to reduce weight as a general proposition. They are the thin, alert, active individuals. Of course, there may be a time during the course of this development where the patient may be obese, but won't be very very long before he will lose his obesity, because his own gland manufacture is not different than if it is administered medicinally, so the effect is really to lose weight.

Q. Doctor, some reference has been made in this hearing to the toxic effect of ex-optalmic goiter, is that to be disguished from hyper-thyroidism?

A. Hyper-thyroidism means the gland is producing an excess amount of its normal secretion. Ex-optalmic goiter is spoken of as toxic goiter and produces an abnormal secretion, differing chemically from the normal, so a case of hyperthyroidism is differentiated from a case of optalmic goiter. However, both of them are thin individuals and they will lose weight.

Q. Is the secretion of an ex-optalmic goiter toxic?

A. Yes.

Q. In other words, the ex-optalmic goiter is pouring into the system a poisonous solution?

A. Instead of a normal secretion, it is pouring into the system an abnormal secretion.

By Examiner Averill:

Q. Abnormal in the quality of the secretion you mean, do you?

A. That is exactly it. It differs qualitatively. It is a different compound than the normal secretion.

Mr. Gust: I think you may cross-examine.

Cross-examination by Mr. Hornibrook:

Q. When a person comes to your office to be treated for obesity, what do you do first?

A. I do the same as I do with any ambulatory patient

that comes to the office. I give him as careful an examination as I am capable of, and as careful a one as he is willing to pay for.

Q. That includes an examination of the heart and urine?

A. That includes examination of the alimentary tract which can include an examination of the blood, various examinations of the blood, it includes an examination of the circulatory system, the urinary system, his endocrines and a few other factors that would suggest themselves, also including the focal infections of various kinds.

Q. That is in an obesity case?

A. That is in any case where the patient is obese or whether he comes for any other purpose. In my opinion, that should be done with every patient that comes to your office.

Q. Why do you subject an obese patient to that examination?

A. Because obese patients, besides suffering from obesity, may be suffering from various other disabilities, and I would not like to have it said that a patient came to me and I overlooked the fact that he might have an ulcer or a chronic appendix or syphilis, or any one of a a lot of other things, not because it is essential to the treatment of obesity, but because I don't want it said that I overlooked anything.

Q. Do you always use thyroid with obese persons?

A. Practically.

Q. Do you not sometimes prescribe diet and exercise in lieu of thyroid?

A. I use them in conjunction with thyroid.

Q. And you always use thyroid?

A. Well, there have been cases where I have gotten along without it.

Q. Do you require a patient after administering thyroid to return for further examination?

A. If that seems necessary, and usually it does be cause if we simply outline a system of treatment for a patient and leave him to his own devices, the average individual will do that for a little while and will slip a little and then will slip a litte more, and then the first thing you know he is off the regime entirely, whereas if you have him come back once a week or once every couple of weeks and you go over what you told him before and see whether he has carefully done that, it is a much better scheme.

Q. Do you use Marmola in your practice at all?

A. No, but I use the thyroid that it contains.

Q. If an obese patient came to you, would you prescribe for that patient two grains of thyroid per day, taken for a period of sixty to ninety days without any further examination, physical examination?

A. No, as I stated before, I would not want to overlook some other defect that this patient had in addition to the obesity.

Q. I don't think you got my question. What I meant to say was if a patient came to you and you made an examination of him, would you prescribe two grains of thyroid per day for a period of sixty or ninety days, to be taken without any further examination of that patient.

A. No, it might be a shorter period of time or it might be a longer period of time. I might set either sixty or ninety or thirty days, or a hundred days, or two hundred days as the limit, depending on the patient.

Q. You would suggest that the patient should return for fourther physical examination after taking the thyroid?

A. Well, not necessarily. That depends on what you mean by physical examination, to see how he progresses?

Q. For further observation.

A. For observation, yes.

Q. Now in a case of hypo-thyroid, the hypo-thyroid secretes more thyroid.

A. No, sir, less. Hypo is under and hyper is over.

Q. The hypo-thyroid secretes less thyroid.

A. Yes.

Q. So in order to achieve the results you are after, it would require a larger dose of the thyroid remedy, would it not, than for a normal person?

A. Of course that depends first upon your definition of normal, but the patient with a hypo thyroidism can take larger doses than one who is normal.

Q. Isn't that true in cases of myxedema also?

A. Myxedema is a condition where there is practically a general absence of thyroid secretion, and that would hardly be classified as obesity. It is so markedly different from obesity that I don't think even the patient would even think that was obesity.

Q. But that patient secretes less thyroid than a normal person.

A. Yes, sir.

Q. So to bring it to normal, it would require more of the thyroid remedy.

A. Yes.

Q. Is that not true with cretin?

A. Yes.

Q. Now there are cases of obesity where they are hyper thyroid.

A. No, sir. The patient with hyper thyroid is the thin one, the emaciated one.

Q. Is that always the fact?

A. There might be some time during the course of his disability when he might start off weighing 200 lbs., but if he develops a hyper thyroidism today, he would not be emaciated right away, but he would lose weight.

Q. So it is possible for the hyper thyroid beginning with hyper thyroidism, if I might use that term, to be an obese person.

A. Very early in the condition, but he would use weight and ordinarily that is a theoretical consideration rather than a practical one. The one that comes to our office with hyper thyroidism is always a thin individual and not an obese individual, but theoretically there might be a time when he might be still obese, average weight, but it would not last very long.

Q. In cases of myxedema, are there not cases of obesity along with that too?

A. Myxedema is a very serious ailment and an individual with myxedema does not come to the physician on account of any increase in weight. Not only that, but myxedema is an exceedingly rare proposition.

Q. Are there not cases of obesity along with that?

A. Yes.

Q. With cretin, are there not cases of obesity?

A. The cretin is a mental and physical baby.

Q. And very often obese?

A. They have large bellies, yes.

Q. So that in treating cases of obesity where there might be— take a case of hyper-thyroid where there might be some obesity, myxedema where there might be some obesity and the cretin, who is always obese and then the case of a person with normal thyroid glands, you have the four now before you, it would be impossible and impracticable, and not good practice, to prescribe the same amount of thyroid for each one of those patients.

A. Of course, you are putting in the same category, conditions which are so dissimilar from each other that it is a little difficult to compare them. In the first place, a cretin is just simply an imbecillic individual that is a child, maybe two or three or four years old, who has not learned to feed itself or has not developed mentally or

physically, and nobody would mistake that for being a case of obesity. How anybody could do that is hard to imagine.

Myxedema, the same thing applies to that, to that individual he is in a very serious condition. Incidentally, he may be a little overweight, but obesity is not the thing that is paramount with him.

The third variety that you speak of, the individual with hyper-thyroidism, he may be still obese without taking any treatment at all, he will very rapidly reduce in weight, and if he gets thyroid at the same time, he will reduce a little more rapidly than he would depending upon the size of the dose of thyroid.

Q. I will ask that my question be repeated. I enjoyed the discussion, but you are not really answering my question. Will you read the question.

(The question read.)

A. Well, the cretin needs larger doses and myxedema needs larger doses.

Q. Now with the hypo-thyroid, that patient secretes less of the thyroid.

A. Yes.

Q. And with the hypo-thyroid case, there is less of the thyroid engendered.

A. Yes.

Q. Less secretion.

A. Yes.

Q. And in that instance you would give more than in the normal.

A. Yes.

Q. And it would not be in good practice and would not be proper to prescribe the same amount of the thyroid remedy for the normal person and the hypo-thyroid person, is that the fact?

A. I would not say it is bad practice to do that, but you can regulate the dose better by giving a larger dose to the hypo than you would to the normal.

Q. You would not get good results by giving them both the same.

A. You would get good results in either case. In either case, it would increase the metabolic rate the same, only the hypo case can stand for a greater increase than the average.

Q. Now, in the case of the hypo thyroid, the myxedema and the cretin, it would take more of the thyroid to increase the metabolic rate, is that a fact?

A. No, it would increase the metabolic rate the same in any one of these cases. The metabolic rate would be increased by the same amount in each of these individuals—I know what you are getting at—but to bring it to normal, it would take a larger amount for the cretin or myxedema than one who is merely slightly hypo thyroid. I think that is what you are trying to get at.

Q. Are there not, doctor, some afflictions of the heart in which you would not use the thyroid remedy at all.

A. Well, there might be some conditions in the heart in which we would not think of thyroid, but would think of other remedies, heart remedies rather than reduction remedies. You mean where thyroid is a contra indication?

Q. I am speaking of an obese person, who, on examination, you find has a certain heart affliction. Are there not certain heart afflictions that obese people have in which you would not prescribe thyroid?

A. No, in fact it would be beneficial in pretty nearly all of them.

Q. Take a case of endocarditis. Would you prescribe thyroid to an obese person with endocarditis?

A. There are so many kinds of endocarditis, acute and chronic and many others, that you would have to specify the particular one.

Q. Well, say chronic first.

A. Which variety do you mean? There are many different varieties. There is the ulcerative endrocarditis, in which thyroid medication is actually beneficial.

Q. Name some of those where it is not beneficial, if that is the fact.

A. There are not any. It simply is not the remedy of choice. It is not a remedy that a physician would use for endocarditis.

Q. Is there any variety of endocarditis in a patient who comes to you afflicted with endocarditis and wants to be treated for obesity in which case of endocarditis you would not give him thyroid?

A. No, there is no such thing.

Q. That can be given with perfect safety?

A. Unless he had along with hyper thyroidism. I would not, but with that one exception, thyroid would not be contra indicated because the patient had endocarditis.

Q. You would give him thyroid in any variety of endocarditis?

A. If he needs the thyroid, but endocarditis is no contra indication for the administration of thyroid.

Q. In a case of endocarditis you would give him thyroid?

A. If he needs the thyroid, but endocarditis is not a contra indication for the administration of thyroid.

Q. I am speaking of a case of obesity. If he had that affliction or any variety of it, that would not stop you from prescribing thyroid for the obesity.

A. No. The endocarditis is not a contra indication of the administration of thyroid.

Q. Are there certain afflictions of the kidney where it is not good practice to give the thyroid remedy?

A. No, there are not.

Q. Now, doctor, in a case of dropsy, would you use thyroid in a case of overweight when the affliction was diagnosed as dropsy?

A. Dropsy, of course, is an accumulation of water in the tissues, and is entirely separate and distinct from obesity, and whether any patient would be so ignorant as to mistake dropsy for obesity, I don't know, but even if thyroid were administered in a case of dropsy, it would nevertheless reduce that dropsy. Very frequently you give thyroid to a patient with an accumulation of water in his system and it increases the output of the urine very considerably.

Q. Didn't you testify in the hearing on Marmola before the postal authorities in Washington, D. C., in January, 1927? You did so testify, didn't you?

A. I testified there. I don't know what you are talking about as to my having testified. I testified at that hearing, but I don't know what you are looking at there.

Q. I am reading from page 391. I will ask you to state whether these questions were not asked and these answers given by you.

> "A. Well, I am talking about the Marmola prescription. For my purpose, the Marmola prescription is practically thyroid. The rest of it is more or less infinitesimal, in comparison. You are asking me the question whether I would do that in my particular case, in my practice.
>
> Q. Thyroid would have a tendency to remove water from the system?
>
> A. Yes, it does. However, it is not the course I would pursue in the practice of medicine.

Q. Would that be the indicated method to pursue to administer thyroid?

A. No. I would have to have available a long list of other facts before I could determine the best method of reducing dropsy. There might be some cases in which I would use thyroid, but probably there would be many more in which I would not.

Q. There would be probably a very few in which you would use thyroid, is that correct?

A. Yes, I think you are right.

Q. As a matter of fact, do you not think in a great many cases it would be contra indicated?

A. I suppose you could dig up some cases, but none come to my mind right now. Tell me what character of dropsy you refer to and I can answer the question much more intelligently."

I will ask you if you did not testify as I have read to you at the hearing I have indicated.

A. Yes, that is absolutely correct, and that is just a reptition of what I said today. In essence, it is a repetition of the same thing.

Mr. Hornibrook: That is all, doctor.

Examiner Averill: Is that all you gentlemen want of this witness? I am very much obliged to you doctor, and you are excused.

(Witness excused.)

Examiner Averill: If you have no further witnesses this afternoon, we will adjourn until 10:00 tomorrow morning.

(Whereupon at 3:30 P. M. an adjournment was had until October 27, 1928, at 10:00 A. M.)

Chicago, Illinois, October 27, 1928.

Met pursuant to adjournment, at 10:00 o'clock A. M.

Before:

Edward M. Averill, Examiner.

Appearances:

Edward J. Hornibrook, for the Federal Trade Commission, Washington, D. C.

R. M. Connors, 560 Equity Building, Detroit, Michigan; Rockwell Gust, 2214 First National Bank Building, Detroit, Michigan, and Robert E. Cantwell, Jr., 1105 Hartford Building Chicago, Illinois, for the respondent.

Samuel F. Haverstock.

SAMUEL F. HAVERSTOCK, was thereupon called as a witness, and having been first duly sworn, testified as follows:

Direct Examination by Mr. Gust:

Q. Will you please state your name.
A. Samuel F. Haverstock.
Q. Where do you reside, Doctor?
A. Detroit.
Q. How long have you lived in Detroit?
A. Twenty-five years.
Q. Are you a practicing physician?
A. I am.
Q. What school are you a graduate of?
A. Detroit College of Medicine, Detroit.
Q. What year?
A. 1909.
Q. Have you been engaged in the practice of medicine since that time?
A. Since that time.
Q. And you are now?
A. I am now.
Q. Where is your office?
A. In the Macabee Building, Detroit.
Q. Do you specialize, Doctor?
A. I do.
Q. In what?
A. I specialize in the treatment of obesity and general surgery.
Q. And how long have you been specializing in the treatment of obesity and general surgery?
A. About ten or twelve years.
Q. Doctor, how many obese patients have you treated?
A. I have treated several thousand.
Q. Doctor, are you familiar with a drug known as dessicated thyroid, or a substance known as dessicated thyroid?
A. I am.
Q. How many years have you been using that drug or substance?
A. Ten or twelve years.
Q. Can you give us any idea of the amount of it you use in your practice?
A. I use half a million grains a year.
Q. In the treatment of obesity, Doctor, what medicaments do you use?

A. Glandular substances almost entirely.

Q. And included in those you use thyroid substance.

A. Yes.

Q. Do you prescribe a diet for your patients in the treatment of obesity?

A. Not now.

Q. Do you prescribe any system of exercise in the treatment of obesity?

A. Not now.

Q. About how many obese patients do you treat each day?

A. Oh, about ten to thirty.

Q. At the present time?

A. At the present time.

Q. What is the range of the dosage of thyroid substance, dessicated thyroid, that you use in the treatment of obesity?

A. From six to thirty-five, six to forty, daily.

Mr. Hornibrook: What does he mean by that?

By Mr. Gust:

Q. That is forty what?

A. Forty grains daily.

Q. And over what period of time do you give the six grain dose?

A. Generally for the first week or two or three weeks, sometimes only one week.

Q. I mean, six grains a day?

A. Yes.

Q. Over what period of time have you had occasion to administer dessicated thyroid to obese patients? I mean, how long on the various patients, how long have you treated the various patients?

A. You mean continuously?

Q. Yes.

A. Oh, I have had patients under treatment as much as seven or eight years, not continuously, but more or less.

Q. Doctor, are you familiar with the prescription of Marmola tablets?

A. I am familiar with the formula.

Q. You are familiar with the formula?

A. I have read it a number of times.

Q. It is contained in the little booklet which has been marked in these proceedings, Commission's Exhibit 3. Doctor, in your opinion, can that Marmola tab-

let, compounded according to that formula, be taken four times a day for a period of sixty to ninety days, without harmful results, or danger of harmful results to an obese patient?

A. You say, can it be given?

Q. Taken.

A. It can be taken, yes.

Q. Doctor, in your opinion, would that Marmola tablet, given four times a day for a period of sixty to ninety days, be effective to remove excess fat from an obese person?

A. Yes.

Mr. Gust: That is all, you may cross-examine.

Cross-examination by Mr. Hornibrook:

Q. What school did you say you graduated from, Doctor?

A. I graduated from the Detroit College of Medicine, Detroit.

Q. When was that?

A. That was in 1909.

Q. And where did you first practice?

A. In Detroit.

Q. And have you been practicing there ever since?

A. Yes, sir.

Q. Do you belong to any medical societies?

A. Yes.

Q. What?

A. I belong to the Wayne County Medical Society, the Michigan State Medical Society and the A. M. A.

Q. What is the A. M. A.?

A. The American Medical Association.

Q. What branch of medicine did you first take up? Did you specialize in any branch to begin with?

A. No, I did general practice the first few years, although I have been doing surgery more or less.

Q. And you now confine your practice entirely to the treatment of obese patients?

A. No, sir.

Q. What is the major part of your practice?

A. I should judge it is about half of my practice.

Q. Is it not a fact that you claim surgery as your specialty?

A. Not necessarily. I do surgery and take care of obese patients.

Q. Is your practice outside of your obese patients extensive?

A. Well, that is a comparative term.

Q. Well, what percentage of your patients are obese patients?

A. You mean of my practice?

Q. Yes.

A. I should say around 45 percent of my total practice is obesity.

Q. Do you advertise at all?

A. No, sir, not in the sense of advertising.

Q. You do not use any newspapers or magazines?

A. No, sir.

Q. Do you use Marmola in your treatment?

A. No, sir.

Q. Would you say that two grains of thyroid administered for a period of sixty to ninety days would reduce flesh, fat?

A. Yes, sir.

Q. Will it do it satisfactorily?

A. What do you mean by that?

Q. If you had an obese patient to whom you gave a treatment of two grains a day for sixty or ninety days, would that give satisfactory results?

A. To me?

Q. Yes.

A. No.

Q. You say it will reduce fat?

A. Yes.

Q. That being the case, you start a patient with six grains a day?

A. I am now using a minimum of six grains a day.

Q. And you increase it to forty grains a day.

A. In some cases.

Q. Why use that much if two grains of it will suffice?

A. To me, the dosage of thyroid for my satisfaction depends on the patient.

Q. Well, don't you meet in your practice, Doctor, patients that could not stand six grains a day to start with?

A. I have not.

Q. Do you subject your patients to a thorough physical examination?

A. Not all of them at the start.

Q. What percentage of them do you subject to a physical examination at the start?

A. I look over every obese patient that I see, in fact, I look over patient who comes to my office.

Q. What do you mean when you say "look over"?

A. It is a matter of a rather superficial examination, lasting probably ten or fifteen minutes.

Q. Do you make an examination of the heart?

A. I make an examination of the heart in most cases, not all.

Q. Do you make an examination of the urine?

A. Urine is taken in every case where we have an opportunity. Obese patients, most generally, telephone the office, and in most cases we ask them to bring in a sample of urine and if they bring in a sample or if it is available, we have an urine analysis, but if not, we do not.

Q. And in some instances, you do not make any examination of the heart.

A. Sometimes, not at the start-off.

Q. In other words, you look over the patient superficially, and if you are satisfied that he has no organic trouble, you immediately start him out with six grains of thyroid.

A. No, I would not say that. I do not do that.

Q. What do you do then?

A. I subject the obese patient to a basal metabolic test.

Q. You do that now?

A. Yes.

Q. When did you start that?

A. I have been doing that increasingly for the last five or six years. I started to take a basal metabolic test a number of years ago, and as time goes on, I use more and more of those tests, I have been doing more and more of them.

Q. Do you have an apparatus of your own?

A. Yes.

Q. Do you manipulate it yourself?

A. No, sir.

Q. You have an assistant who does that?

A. I have an assistant who does that.

Q. Would a basal metabolic test divulge to you that a person has heart trouble?

A. I think it would be likely to give me a good deal of information regarding the heart.

Q. Would it enable you to tell whether the patient had kidney trouble?

A. I don't think so.

Q. In fact, there are a great many diseases that an obese patient might have that the metabolic test would not disclose. Is that not a fact?

A. Yes, that is true.

Q. Now, the purpose of making that metabolic test is to determine the amount of thyroid that you would give them, I imagine.

A. That has its value.

Q. And what class of obesity do you come in contact with?

A. Well, we have some basic types that, for the sake of designation we would call by one name or another, and then we have a great many types that we have not given a name to that are what we call "mixed" types under a general term. The classification of obesity patients is an almost endless task.

Q. Will you just give us the classes?

A. I believe that the general classification comes under the head of thyroid obesity, the pituitary, the gonoidal.

Q. What does the last term mean?

A. That has to do with the sex glands.

Q. Some have claimed suprarenal type.

A. I am unable to distinguish that type. And then you have types that are almost endless, differing in physical characteristics as the preponderance of the different basal types is noted.

Q. Do you come in contact with the hypo-thyroid patient?

A. Yes.

Q. And also the treatment?

A. Yes, in the obesity treatment we do not see any cretins. We do see the cretin type, because any man that deals in the endocrinology must see the cretin types.

Q. And you see those afflicted with myxedema?

A. Yes, we see myxedema quite frequently.

Q. In these three cases, if a person were obese, you would give more thyroid than others, isn't that a fact?

A. I don't know that that rule would be true. Each case to me is a law unto itself. We have a surgical myxedema that we see in our town quite frequently and yet it takes a comparatively small dose of thyroid to equalize their physical well-being.

Q. You do give some patients more thyroid than others, do you not?

A. Yes.

Q. What is the physical condition in that case?

A. That is pretty much cut and dried with me. I cannot tell ahead of time how much of a dose of thyroid a patient will take. I would give a good deal to have someone tell me how it could be determined.

Q. But you always start every patient that comes to you with six grains?

A. Practically every patient I start with six grains.

Q. How long a period of time do you permit them to take the six grains?

A. That depends almost entirely on how rapidly they lose, or whether they lose weight at all. Some patient may take six grains and he does not lose in a period of two or three weeks.

Q. Have you had cases where six grains would not reduce at all?

A. Yes.

Q. For how long a period of time?

A. Well, never. There are patients that six grains a day will never reduce them any.

Q. And in cases of that kind, two grains a day would be futile entirely?

A. I think so, yes, and so is forty grains. Sometimes forty grains won't reduce them at all.

Q. What type of cases are those?

A. I don't know, I am trying to find out.

Q. Take a case in which you are giving six grains a day, do you require the patient to return?

A. I require an obese person, as a general rule, to come in every week for a period of one month.

Q. And what do you do when they come in?

A. When they come in, if the patient's general condition is satisfactory and there are no symptoms of uneasiness, no symptoms that would lead me to suspect that the patient was not doing well, I supply them with more medicine and that is about all I do for them.

Q. If they have no tremor, no symptoms of having taken too much thyroid, no perspiring, do not complain of perspiring overly much, you make no physical examination.

A. Not unless there is some symptom, some condition that urges me to do it.

Q. What condition would that be?

A. Well, the one thing that makes me examine a patient more frequently than anything else, is the trembling of the knees. Sweat is a thing that obtains infrequently, even with large doses. Sweating does not happen in the average obese person, on account of the dosing

of thyroid. Twenty or thirty grains will not make a patient sweat.

Q. You say trembling of the knees?

A. Yes.

Q. After having given six grains a day, say for three weeks, do you encounter that condition with trembling of the knees?

A. No, not with six grains. In fact, you very infrequently get any trembling of the knees in an obese patient on six grains a day.

Q. Then you keep on increasing until you get one that will tremble at the knees?

A. As a rule, I increase their thyroid substance until I get a certain amount of trembling or hyper-thyroidism.

Q. And when you have that, you know the thyroid is working?

A. I know it is working up to its full physiological action.

Q. And that is satisfactory to you?

A. Yes.

Q. And you sometimes increase it as high as forty grains before bringing about a trembling of the knees?

A. Not as a rule, but I have done it. Forty grains is rather a top dose with me. I should say forty is the maximum, while forty grains has been used occasionally, but not as a general rule.

Q. You get cases where you do not get a trembling of the knees until you go to forty grains?

A. It is not particularly the trembling of the knees that I am trying to get. I am only answering your question when you speak of trembling of the knees because it is the thing that indicates to me quickest that I am getting the physiological action on the fat.

Q. Really reducing the flesh?

A. Getting to a place where I get mighty quick results, when I get to that stage.

Q. Now, during the treatment or after the treatment of an obese patient, have you come in contact with any patient that took sick?

A. What do you mean by "sick"?

Q. Don't you know what I mean by sickness?

A. Most any patient is liable to get sick at any time.

Q. During your treatments have any of your patients been taken sick?

A. I presume they have, yes.

Q. And do they send for you for that sickness, or do they go elsewhere?

A. I presume they do both, some patients will come to me and some will go to somebody else.

Q. Have you ever had any patients die during your treatments?

A. I never have.

Q. Have you ever noticed any of your patients come back with extraordinary symptoms of having taken too much thyroid?

A. Oh, yes.

Q. What are those symptoms?

A. Exaggerated symptoms of hyperthyroidism. We see that every once in a while, because we overshoot the mark just the same as we undershoot it.

Q. And you say that Marmola, taken in accordance with the instructions is under-shooting the mark?

A. I think so, according to my idea of it and my experience with thyroid substances, it is under-shooting the mark.

Q. But, have you any authority, any standard authority that you can produce which will sustain you in giving six grains of thyroid to a patient for a period of three weeks and then increase it to forty grains?

A. Have I any authority?

Q. Yes.

A. None, only that is branded in me as a medical man in the use of drugs.

Q. As a matter of fact, there is no such authority?

A. That is my opinion. There is no printed reason for handling thyroid as I handle it.

Mr. Hornibrook: That is all.

Redirect Examination by Mr. Gust.

Q. Do you know of any drug in the Pharmacopoeia that does not occasionally fail?

A. I do not.

Q. When you say you think that Marmola undershoots the mark, you mean to say it would be more effective and reduce faster if it were given in larger quantities.

A. Yes.

Mr. Gust: That is all.

Examiner Averill: Thank you, doctor.

(Witness excused.)

Samuel F. Haverstock

Examiner Averill: Now, do we understand that the respondent rests?

Mr. Gust: The respondent rests.

Examiner Averill: And the Commission rests?

Mr. Hornibrook: Yes.

Examiner Averill: Then the taking of the testimony in the instant case is now closed, and the Examiner will proceed as early as possible after the receipt of the transcript to prepare and serve a report upon the facts upon the attorneys for the Commission and for the respondent. To this report the attorneys on either side may take such exception as they deem advisable. Thereafter the briefs are to be filed if desired before the Commission, and the Commission will set a date for the hearing of oral argument upon the record in the cause, upon the report of the Examiner and such exceptions as may have been taken thereto, and thereafter the Commission will render its decision in this cause.

(Whereupon at 11:00 A. M. the hearing was concluded.)

372–376 In United States Circuit Court of Appeals for the Sixth Circuit

RALADAM COMPANY, PETITIONER

vs.

FEDERAL TRADE COMMISSION, RESPONDENT

Petition for review

Filed Feb. 12, 1930

Now comes the Raladam Company, petitioner above named, and respectfully says:

1. The Raladam Company, petitioner, is a corporation duly organized and existing under and by virtue of the laws of the State of Michigan, and has its principal office and place of business, and resides and carries on business, in the city of Detroit, county of Wayne, and State of Michigan, within the sixth judicial circuit of the United States and within the jurisdiction of this court.

2. Respondent is a public body known as the Federal Trade Commission, organized and existing under an act of Congress ap-
377 proved September 26, 1914, entitled "An act to create a Federal Trade Commission; to define its powers and duties; and for other purposes" (U. S. Code, Tit. 15, secs. 41 et seq.), and the members of said body were appointed by the President of the United States, with the consent of the Senate, in pursuance of said act of Congress. Its principal office is in Washington, District of Columbia.

3. Petitioner's business, which it carries on at the place aforesaid, consists of causing a certain commodity, known as Marmola prescription tablets, to be manufactured for petitioner at said city of Detroit in accordance with a formula owned by petitioner, and of selling said commodity in interstate commerce to various dealers in such commodity throughout the United States. As a part of its said business, and in the interest of promoting sales of the said commodity, petitioner advertises the said commodity in various advertising mediums circulating in interstate commerce throughout the said United States.

4. Said commodity, Marmola prescription tablets, is a remedy for excessive fatness in human beings. Each Marmola prescription tablet contains the following ingredients, in the following amounts, to wit: 1 grain extract bladderwrack, ½ grain extract phytolacca, ¼ grain extract cascara sagrada Rx. 87 spec., ½ grain desiccated thyroid, ¼ grain phenolphthalein, 16/1000 min. oleoresin ginger po. saccharum special, 3 grains calcium carbonate precipitated, $\frac{1}{24}$ min. methyl salicylate, $\frac{1}{24}$ min. oil anise, $\frac{1}{24}$ min. oil sassafras, talc. brown, ivory black, aqua for extracts, po. burnt umber, red oxide of iron, syrupus simplex, lubricating solution, aqua for granulating,
378 liquid petroleum colorless. The active ingredient of each of said tablets, for fat-reducing purposes, is the ½ grain of desic-

cated thyroid that is contained in each of said tablets. The ¼ grain of cascara sagrada and the ¼ grain of phenolphthalein contained in each tablet are mild laxative agents, and possibly the ½ grain of extract of phytolacca in each tablet is also. The other ingredients of each tablet have no material physiological action except for their possible synergistic effect, and are used either to subserve manufacturing convenience or necessity, or to improve the appearance or taste of the tablet, or for some like collateral and incidental purpose.

5. The said tablets are designed and intended to be taken internally by human beings, and to be self-administered. Said tablets are offered for sale and sold by petitioner, as aforesaid, in packages. Upon the outside of the container of each package and also in a circular enclosed inside of each package of said tablets the petitioner gives printed directions and recommendations with reference to the self-administration of said tablets by the users thereof, which directions and recommendations relate to such matters as the question of what persons should take said tablets, and the question of how many of said tablets should be taken by the user thereof, and when and for how long a period of time they should be taken, and the question of how the user of such tablets should regulate his diet and exercise, and the question of when he should consult a physician, and other pertinent questions likely to arise in the mind of a user of said tablets.

6. On or about March 9, 1928, respondent served upon petitioner its complaint (Docket No. 1496) against petitioner, a complete
379 copy of which said complaint will appear in the transcript of the record of respondent's proceedings against petitioner which will be filed in this court by respondent in due course. In its said complaint respondent charged, in substance and effect, that petitioner, in its business aforesaid, was guilty of "using unfair methods of competition in commerce," in violation of U. S. Code, tit. 15, sec. 45; and further charged, in substance and effect, that petitioner's said alleged "using unfair methods of competition in commerce" consisted of the publication by petitioner in its advertisements of alleged false statements of and concerning the petitioner's said Marmola prescription tablets. The gist of the charge made by respondent in its said complaint was that petitioner, in and by its advertisements, stated and represented, of and concerning its said tablets, that said tablets (A) were (a) a scientific method for the treatment of obesity, and (b) based on long scientific research; and (B) were safe, pleasant, and effective in their medicinal properties; and (C) could be used by purchasers thereof without discomfort, inconvenience, or danger of harmful results to the physical health of the users thereof; and that such statements and representations so alleged to have been made by petitioner in its said advertisements were each and all false and untrue. The charge in the said complaint was that said statements and representations so alleged to have been made by petitioner in its advertisements of and concerning its said tablets, were ren-

dered false and untrue by reason of the presence of the ½ grain of desiccated thyroid in each of petitioner's said tablets. There was no other or additional charge in the said complaint.

7. Thereafter petitioner, in due time, filed its answer to re-
380 spondent's said complaint, a complete copy of which said answer will appear in the transcript of the record of the respondent's proceedings against petitioner which will be filed in this court by respondent in due course. Said answer of petitioner was such, in substance, as to raise issues as to whether or not petitioner had been guilty of false advertising as charged, in substance, in respondent's said complaint as aforesaid.

8. Thereafter evidence adduced by respondent and petitioner, respectively, was taken at various times and places before honorable Edward M. Averill, as trial examiner for respondent, with reference to the issues raised by respondent's said complaint and petitioner's said answer thereto. Substantially the only evidence adduced bearing upon the question of the truth or falsity of the statements and representations made by petitioner in its advertisements of and concerning its said tablets consisted of the testimony of eleven physicians, who testified as expert witnesses and gave opinion evidence and nothing else, six of said physicians testifying in behalf of petitioner and five in behalf of respondent.

9. After the taking of evidence had been concluded before, and said evidence had been considered by, the said trial examiner, said trial examiner made his report to respondent with reference to what facts were established by said evidence. A complete copy of the said report of the trial examiner will appear in the transcript of the record of the respondent's proceedings against petitioner, which will be filed in this court by respondent in due course. After reviewing the evidence that had been adduced before him, and making various
381 findings of fact based thereon, the said trial examiner concluded his said report, as follows:

"Eleven physicians have testified in this cause. These men, so far as can be gathered from seeing and hearing them testify, from weighing their qualifications as given in evidence, appear all of them to be of high standing in their profession. They are all members of the American Medical Association and of other medical associations in their respective States, and all of them appear to be acquainted with thyroid as a medicament, but there is a sharp variation in their testimony, five of them testifying that:" (The trial examiner at this point in his report summarized the testimony of the five physicians.) "Six of them testify that:" (The trial examiner at this point in his report summarized the contrary testimony of the six physicians.) "With such conflict as is shown by this record, it becomes extremely difficult to determine what is the fact in connection with the statements alleged to have been made by the respondent that the Marmola prescription tablets are a scientific method based on long scientific research; that its medicinal properties are safe, pleasant, and effec-

tive; that said tablets may be used by purchasers thereof without discomfort, inconvenience, or danger of harmful results to the physical health of such users; that said tablets are a scientific method for the treatment of obesity. We appear to be involved in a scientific dispute the determination of which cannot be safely or justly predicated upon the evidence contained in this record."

The trial examiner was the only trier of facts who heard the eleven physicians testify, and had an opportunity to see them and to observe their demeanor while they were testifying. None of the members of respondent was present at the taking of any testimony.

382 10. Thereafter exceptions were filed to the said report of the trial examiner by the respondent and petitioner, respectively. And thereafter a hearing and oral arguments were had before the respondent, based upon its said complaint against petitioner and the petitioner's answer thereto, and the documentary evidence and the typewritten record of the testimony that had been taken before the trial examiner, and the trial examiner's report upon the facts and the exceptions that had been filed to such report, and the briefs that had been filed in behalf of respondent and petitioner, respectively.

11. Thereafter, and on or about April 15, 1929, respondent made findings of fact and conclusions of law, and upon the basis thereof entered an order to cease and desist against the petitioner. Copies of said findings of fact and conclusions of law and order to cease and desist are hereunto attached, marked "Exhibit 1," and hereby made a part hereof.

12. Petitioner says that paragraph Five of said findings of fact is erroneous and is not supported by testimony in so far as it finds:

(a) That petitioner gave unconditional directions that the users of its said tablets should, at all events and under any and all circumstances, take one tablet after each meal and at bedtime, for from 60 to 90 days; and

(b) That phenolphthalein, cascara sagrada, and phytolacca are "powerful" laxatives.

13. Petitioner says that paragraph Five of said findings of fact is erroneous in so far as it finds that petitioner gave unconditional directions that the users of its said tablets should, at all events and under all circumstances, take one tablet after each meal and at bedtime for from 60 to 90 days, in that respondent could not have arrived at such findings except by a rejection by respondent, which was wholly arbitrary and capricious, of undisputed documentary evidence in the record.

383

14. Petitioner says that paragraph Seven of said findings of fact is erroneous and is not supported by testimony, in so far as it finds:

(a) That the representations made by petitioner in its advertisements of and concerning its said tablets, as such representations are found and set forth in paragraph Six of said findings of fact, were all, or that any one of them was, false and misleading.

(b) That the preparation of petitioner's Marmola prescription tablets is neither the result of, nor based upon, scientific research, knowledge, or accuracy.

(c) That petitioner's Marmola prescription tablets are not safe, pleasant, and effective in their action in the removal of excess flesh from the human body, except when administered under the direction of a competent medical adviser.

(d) That petitioner's Marmola prescription tablets may not be used by purchasers thereof without discomfort, inconvenience, or danger of harmful results, except when administered under the direction of a competent medical adviser.

(e) That petitioner's Marmola prescription tablets are not a scientific method for the treatment of obesity, and are not based upon many years of scientific research in the United States of America and in foreign lands, and are not based upon any scientific research.

384 (f) That petitioner's Marmola prescription tablets will not act with uniformity upon the bodies of all users thereof.

(g) That petitioner's Marmola prescription tablets will not be generally effective for the reduction of excess flesh of the users thereof, without impairing the health of a substantial number of such users.

(h) That petitioner's Marmola prescription tablets may not be safely used by any purchaser thereof, without previous consultation with a competent medical adviser, and under his continuing observation and advice.

(i) That the thyroid in petitioner's Marmola prescription tablets, when introduced into the human body, is a powerful agent, liable at all times to produce radical changes of conditions that will be harmful to the users thereof.

(j) That in any case where petitioner's Marmola prescription tablets are taken harmful changes of conditions in the body of the person taking such tablets cannot be safely guarded against except by the previous and continuing investigation, observation, and advice of a competent physician.

(k) That the use of petitioner's Marmola prescription tablets for the purpose of reducing or removing excess flesh is liable to have an injurious effect upon the person so using such tablets, unless such person obtains further information, guidance, and advice than is furnished by petitioner.

(l) That the taking of four of petitioner's Marmola prescription tablets a day for a period of 60 to 90 days would be likely to create in the taker thereof what is known in medical science as the laxative habit.

385 15. Petitioner says that paragraph Seven of said findings of fact is erroneous in that it deals not with questions of fact, but with questions of controverted medical opinion in respect of which respondent has no lawful power or authority to make any findings whatsoever.

16. Petitioner says that paragraph Seven of said findings of fact is erroneous in that respondent could not have arrived at the opinions stated therein except by a rejection by respondent, which was wholly arbitrary and capricious, of the testimony of all of petitioner's expert witnesses, and of some of respondent's expert witnesses.

17. Petitioner says that paragraph Seven of said findings of fact is erroneous in that there was not any charge in the complaint filed by respondent against petitioner, to the effect that the statements and representations alleged in said complaint to have been made by respondent in its advertisements of and concerning its Marmola prescription tablets, were rendered false and untrue in any degree by reason of the laxative content of said tablets.

18. Petitioner says that paragraph Eight of said findings of fact is erroneous and is not supported by testimony.

19. Petitioner says that paragraph Eight of said findings of fact is erroneous in that it deals not with questions of fact but with questions of controverted medical opinion in respect of which respondent has no lawful power or authority to make any findings whatsoever.

386 20. Petitioner says that paragraph Eight of said findings of fact is erroneous in that respondent could not have arrived at the opinions stated therein except by a rejection by respondent, which was wholly arbitrary and capricious of the testimony of all of petitioner's expert witnesses and of some of respondent's expert witnesses.

21. Petitioner says that respondent's conclusions of law, attached to its findings of fact, are erroneous and contrary to law and in excess of the lawful power and authority of the respondent.

22. The first paragraph of said order to cease and desist orders the petitioner to cease and desist from directly or indirectly—

"Representing that Marmola is a scientific and accurate method for treating obesity."

Petitioner says that said order to cease and desist is not justified or supported by the evidence or by the findings, is contrary to law, and is in excess of the lawful power and authority of respondent.

23. The second paragraph of said order to cease and desist orders the petitioner to cease and desist from, directly or indirectly—

"Representing that the formula from which Marmola is made is a scientific formula."

Petitioner says that said order to cease and desist is not justified or supported by the evidence or by the findings, is contrary to law, and is in excess of the lawful power and authority of respondent.

387 24. The third paragraph of said order to cease and desist orders the petitioner to cease and desist from, directly or indirectly—

"Representing that Marmola is the result of scientific research."

Petitioner says that said order to cease and desist is not justified or supported by the evidence or by the findings, is contrary to law, and is in excess of the lawful power and authority of respondent.

25. The fourth paragraph of said order to cease and desist orders the petitioner to cease and desist from, directly or indirectly—

"Representing that Marmola can be taken without the advice or direction of competent medical authority, as a safe and harmless remedy in the treatment of obesity."

Petitioner says that said order to cease and desist is not justified or supported by the evidence or by the findings, is contrary to law, and is in excess of the lawful power and authority of respondent.

26. The fifth paragraph of said order to cease and desist orders the petitioner to cease and desist from, directly or indirectly—

"Representing that Marmola can be taken with no harmful results to the physical health, without the advice and direction of competent medical authority."

Petitioner says that said order to cease and desist is not justified or supported by the evidence or by the findings, is contrary to law, and is in excess of the lawful power and authority of respondent.

388 27. The sixth paragraph of said order to cease and desist orders the petitioner to cease and desist from, directly or indirectly—

"Representing Marmola as a remedy for the treatment of obesity, unless such representation is accompanied by a statement that Marmola cannot be taken with safety to physical health except under the direction and advice of competent medical authority."

Petitioner says that said order to cease and desist is not justified or supported by the evidence or by the findings, is contrary to law, and is in excess of the lawful power and authority of respondent.

28. Petitioner says that it has not at any time been guilty of the alleged unfair acts or methods of competition, or any of them, mentioned in the respondent's said findings and in its said order to cease and desist; that the findings that petitioner has been guilty of any such unfair acts or methods of competition, or any of them, are not supported by testimony, and are contrary to law; and that the order to cease and desist should not have been made and entered against petitioner, nor should any part thereof, and that said order, and every part thereof, is contrary to law and in excess of the lawful power and authority of respondent.

29. The acts and things shown in the testimony that are claimed by respondent to support the charges of the complaint above referred to, and upon which the findings and the order of the respondent were apparently based, were not unfair methods of competition by petitioner within the meaning of the Federal Trade Commission

389 act, and did not authorize or empower respondent to make and enter the order to cease and desist aforesaid, or any part thereof.

Wherefore petitioner prays that a copy of this petition be served upon the respondent, and that the respondent be required to certify

and file in this court a transcript of the entire record of the proceedings of respondent against petitioner, including all the evidence introduced and testimony taken, and the report of the trial examiner and the exceptions thereto, and the report and order of the respondent; that the findings and the order to cease and desist attached hereto (Exhibit 1) be set aside, and held for naught; and that the petitioner be given such other and further relief as may be just and equitable, and may recover its costs herein expended.

RALADAM COMPANY,
By ADENE MOSS, *President.*

STEVENSON, BUTZEL, EAMAN & LONG,
Attorneys for Petitioner.

390 [*Duly sworn to by Adene Moss; jurat omitted in printing.*]

391 *Exhibit 1 to petition for review*

UNITED STATES OF AMERICA

Before Federal Trade Commission

At a regular session of the Federal Trade Commission held at its office in the city of Washington, D. C., on the 13th day of April, A. D. 1929.

Commissioners: Edgar A. McCulloch, chairman; Garland S. Ferguson, jr.; C. W. Hunt; William E. Humphrey; Charles H. March.

Docket No. 1496

In the matter of RALADAM COMPANY

FINDINGS AS TO THE FACTS AND CONCLUSION

Pursuant to the provisions of an act of Congress approved September 26, 1914, the Federal Trade Commission issued and served a complaint upon the respondent, Raladam Company, charging it with the use of unfair methods of competition in commerce in violation of the provisions of section 5 of said act.

Respondent having entered its appearance and filed its answer to said complaint, hearings were had before a trial examiner theretofore duly appointed, and testimony was heard and evidence received in support of the charges stated in the complaint and in opposi-
392 tion thereto. Thereafter this proceeding came on regularly for decision, and the commission having duly considered the record and being now fully advised in the premises, makes this report, stating its findings as to the facts and conclusions drawn therefrom.

Paragraph One. Respondent, Raladam Company, is a corporation organized and existing under and by virtue of the laws of the State of Michigan, having been incorporated in January, 1927, and maintains its office and principal place of business in the city of Detroit, State of Michigan.

Paragraph Two. Respondent is engaged in the sale of an alleged obesity cure, or remedy, which it has named Marmola, and which it sells under the trade name Marmola prescription tablets. The retail price of Marmola is $1.00 per box. Respondent does an annual business in the sale of Marmola of $600,000. Marmola is manufactured for respondent by Parke, Davis & Co., of Detroit, under a formula furnished and owned by the respondent. It is put up in tablet form and is for use by human beings, the same being taken into the mouth and swallowed.

Paragraph Three. The respondent offers for sale and sells Marmola prescription tablets to wholesale druggists and jobbers in every State of the United States, and such wholesale druggists or jobbers resell the same to retail druggists located in the various States of the United States, who in turn resell the same to the consumers or purchasers thereof. The respondent causes the said Marmola prescription tablets to be transported from the city of Detroit, in the State of Michigan, into and through other States of the United States to the purchasers thereof at their respective points of location or places of business.

393 Paragraph Four. The respondent in the course and conduct of its business, as aforesaid, is in competition with other persons, partnerships, or corporations in and throughout the several States of the United States, who are likewise engaged in offering for sale and selling printed professional advice, books of information and instruction, and other methods, means, remedies, and appliances for dissolving or otherwise removing excess flesh of the human body.

Paragraph Five. Respondent in the course and conduct of its business causes its Marmola prescription tablets to be put up in a cardboard container, upon which said container appear the words "Marmola is recommended as a treatment for the reduction of excessive fat," and among other words and figures upon said container appear under the heading "Directions" the following:

"Take one tablet after each meal and at bedtime with enough water to swallow easily. If preferred, tablet may be broken into pieces before taking. This treatment should be faithfully taken as directed from 60 to 90 days in order to obtain the best results."

Enclosed in the package in which Marmola prescription tablets reach the consuming public is the formula from which Marmola is made. Among the ingredients of Marmola are thyroid and three powerful laxatives called phenolphthalein, cascara sagrada, and phytolacca. Each tablet contains ½ grain of thyroid. If one follows the directions contained inside and outside the package, he will consume two grains of thyroid per day. Respondent's principal claim for the medicinal quality and virtue of Marmola is based on the fact that said tablets contain said thyroid, which in-

394 gredient is made from the thyroid gland of food animals and is claimed by respondent and popularly believed to be of great value and effectiveness in the reduction of the fatty portions of the human body.

Paragraph Six. Respondent in the aid of selling said Marmola causes the same to be advertised in newspapers, magazines, periodicals, and other publications of general circulation in the United States and the several States thereof, and in printed matter upon labels attached to or in circulars wrapped about or folded within the box in which such tablets are finally packed, and in printed matter attached to cartons or other containers used in packing and shipping same to purchasers.

In the aforesaid advertisements the respondent causes to be set forth the following representations:

1. That the preparation of said Marmola is the result of, and is based upon, scientific research, knowledge, and accuracy.

2. That its medical properties are safe, pleasant, and effective in their action in the removal of excess flesh from the body.

3. That the same may be used by purchasers thereof without discomfort, inconvenience, or danger of harmful results to the physical health of the users of such compound.

4. That the said Marmola is a scientific method for the treatment of obesity and is based on many years of scientific research in the United States of America and in foreign lands.

395 Paragraph Seven. Each and all of the representations mentioned in Paragraph Six hereof are false and misleading in—

1. That the preparation of said Marmola is not the result of, nor is it based upon, scientific research, knowledge, or accuracy.

2. Its medical properties are not safe, pleasant, and effective in their action in the removal of excess flesh from the human body unless administered under the direction of a competent medical adviser.

3. The same may not be used by purchasers thereof without discomfort, inconvenience, or danger of harmful results unless administered under the direction of a competent medical adviser.

4. Marmola is not a scientific method for the treatment of obesity and is not based on many years of scientific research in the United States of America and in foreign lands, or upon any scientific research.

5. Marmola will not act with uniformity upon the bodies of all users thereof.

6. Marmola will not be generally effective for the reduction of the excess flesh of the users thereof without imperiling the health of a substantial number of such users.

7. Marmola may not be safely used by any purchaser thereof without previous consultation with a competent medical advisor and under his continuing observation and advice.

8. The thyroid in Marmola when introduced into the human body is a powerful agent liable at all times to produce radical changes of conditions that will be harmful to the users thereof.

396 9. Such harmful changes may be safely guarded against in any case where Marmola is taken only by the previous and continuing investigation, observation, and advice of a competent physician.

10. The use of said Marmola tablets for the purpose of reducing or removing excess flesh, without further information, guidance, or advice than is furnished by respondent, is liable to have an injurious effect upon the person so using it.

11. The use of Marmola as directed, i. e., 4 tablets a day for a period of 60 to 90 days, would be likely to create in the user thereof what is known in medical science as the "laxative habit."

Paragraph Eight. In and throughout the several States of the United States are many persons who are seeking some safe and dependable means whereby they may quickly and permanently rid their bodies of excess fat or of portions of the flesh which they now bear and of which they desire to be rid. Said statements and representations made by respondent in said containers, directions, advertisements, labels, pamphlets, and other printed matter, as described in Paragraphs Five and Six hereof, have the tendency and capacity to mislead and deceive the purchasing public into the belief that said Marmola as such remedial agency for the reduction of excess fat or other flesh is a scientific and accurate method of treatment; is the result of many years of scientific research in the United States and foreign countries; is a safe, effective, and dependable remedy that may be used by any and all purchasers thereof without inconvenience, sacrifice, or danger of harmful results to physical health, and have the capacity and tendency to induce users thereof to purchase same in such belief.

397 CONCLUSIONS

The practice of said respondent under the conditions and circumstances described in the foregoing findings are to the prejudice of the public and respondent's competitors and are unfair methods of competition in commerce and constitute a violation of an act of Congress, approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

By the commission:

EDGAR A. MCCULLOCH, *Chairman.*

[SEAL.] E. A. MCCULLOCH. (Sgd.)

Dated this 13th day of April, A. D. 1929.

Attest:

OTIS B. JOHNSON, *Secretary.*

398 UNITED STATES OF AMERICA

Before Federal Trade Commission

At a regular session of the Federal Trade Commission held at its office in the city of Washington, D. C., on the 13th day of April, A. D. 1929.

Commissioners: Edgar A. McCulloch, chairman, Garland S. Ferguson, C. W. Hunt, William E. Humphrey, Charles H. March.

Docket No. 1496

IN THE MATTER OF RALADAM COMPANY

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission on the complaint of the commission, the answer of respondent thereto, the testimony, evidence, briefs, and argument of counsel, and the commission having made its findings as to the facts and its conclusions that respondent has been and is now using unfair methods of competition in commerce in violation of the provisions of section 5 of an act of Congress, approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes":

It is now ordered that respondent, Raladam Company, its officers, agents, representatives, and employees, in connection with the
399 advertising, offering for sale, and sale in commerce among the several States of the United States of the product "Marmola," do cease and desist from directly or indirectly—

1. Representing that Marmola is a scientific and accurate method for treating obesity.

2. Representing that the formula from which Marmola is made is a scientific formula.

3. Representing that Marmola is the result of scientific research.

4. Representing that Marmola can be taken without the advice and direction of competent medical authority as a safe and harmless remedy in the treatment of obesity.

5. Representing that Marmola can be taken with no harmful result to physical health without the advice and direction of competent medical authority.

6. From representing Marmola as a remedy for the treatment of obesity unless such representation is accompanied by a statement that Marmola can not be taken with safety to physical health except under the direction and advice of competent medical authority.

It is further ordered that the respondent, Raladam Company, shall, within sixty (60) days after service upon it of a copy of this order, file with the commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist hereinabove set forth.

By the Commisison:

OTIS B. JOHNSON,
OTIS B. JOHNSON, *Secretary.*

400–401 In United States Circuit Court of Appeals for the Sixth Circuit.

[Title omitted.]

Answer in nature of cross bill

Filed October 11, 1929

Comes now the respondent, Federal Trade Commission, by its attorneys, and shows to the court:

(A) That heretofore, to wit, May 16, 1929, the petitioner, Raladam Company, filed its petition praying this honorable court to review and set aside an order issued by respondent, Federal Trade Commission, on the 13th day of April, 1929, requiring petitioner to cease and desist from certain practices found by said Federal Trade Commission to be unfair methods of competition within the meaning of section 5 of the act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define
402 its powers and duties, and for other purposes" (38 Stat. 717, U. S. C., title 15, sec. 45). A copy of said order to cease and desist, issued by respondent, Federal Trade Commission, is set forth in the transcript of record hereinafter referred to.

(B) Said order to cease and desist was duly served on petitioner on, to wit, April 17, 1929, as required by law, since which time said order has been and is in full force and effect.

(C) That respondent, Federal Trade Commission, in accordance with the provisions of said act of Congress, has certified and filed in this court a transcript of the entire record of the proceedings in the case lately pending before said Federal Trade Commission, and in which said order to cease and desist was entered.

(D) That said proceeding before respondent, Federal Trade Commission, including the complainant, report, findings as to the facts, and conclusions, and order to cease and desist, was had in compliance with and in due conformity to the provisions of the aforesaid act of Congress, and is valid in law. Said proceeding is set forth fully in the aforesaid transcript of record.

(E) That the findings as to the facts, upon which said order to cease and desist is based, are supported by the testimony and other evidence taken in the proceeding duly had as required by law, as fully appears from the aforesaid transcript of record.

403 (F) That said order to cease and desist conforms to the complaint issued in said proceeding and to the commission's findings, and is valid in law.

(G) Upon information and belief that the petitioner has failed and neglected to obey the said order to cease and desist, and has violated and continues to violate the same in the course and conduct of its business of selling and transporting, in interstate commerce, an alleged obesity cure or remedy, designated by it "Marmola," under

the trade name "Marmola prescription tablets," all as hereinafter more particularly set forth.

(H) Upon information and belief that ever since aforesaid date of the service upon petitioner of said order to cease and desist said petitioner has been and now is violating that part of said order which directs it, its officers, agents, representatives, and employees, in connection with the advertising, offering for sale, and sale in interstate commerce among the several States of the United States of the product Marmola, to cease and desist from directly or indirectly—

"1. Representing that Marmola is a scientific and accurate method for treating obesity;

"2. Representing that the formula from which Marmola is made is a scientifie formula;

"3. Representing that Marmola is the result of scientific research;

404 "4. Representing that Marmola can be taken without the advice and direction of competent medical authority as a safe and harmless remedy in the treatment of obesity;

"5. Representing that Marmola can be taken with no harmful result to physical health without the advice and direction of competent medical authority;

"6. Representing Marmola as a remedy for the treatment of obesity unless such representation is accompanied by a statement that Marmola can not be taken with safety to physical health except under the direction and advice of competent medical authority";

in that it has been and now is selling and transporting, in interstate commerce, the product Marmola, under the trade name "Marmola prescription tablets," with the representation, in advertisements appearing in newspapers, magazines, periodicals, and other publications of general circulation in the United States and the several States thereof, and in printed matter upon labels attached to or in circulars wrapped about or folded within the box in which such tablets are finally packed, and in printed matter attached to cartons or other containers used in packing and shipping the same to purchasers:

"1. That Marmola is a scientific and accurate method for treating obesity;

"2. That the formula from which Marmola is made is a scientific formula;

"3. That Marmola is the result of scientific research;

405 "4. That Marmola can be taken without the advice and direction of competent medical authority as a safe and harmless remedy in the treatment of obesity;

"5. That Marmola can be taken with no harmful result to physical health without the advice and direction of competent medical authority; and

"6. That Marmola is a remedy for the treatment of obesity, such representation being unaccompanied by a statement that Marmola can not be taken with safety to physical health except under the direction and advice of competent medical authority."

Wherefore this respondent, Federal Trade Commission, prays this honorable court:

1. That this, respondent's said answer in the nature of cross bill, be filed with this court;

2. That said petitioner, Raladam Company, be directed by this court to make and file herein full, true, direct, and perfect answers to all and singular the allegations contained in paragraphs G and H of this, respondent's, said answer in the nature of cross bill;

3. That certified copies of said answer in the nature of cross bill, and of the order of this court directing the filing thereof, and directing said petitioner to make and file answers to paragraphs G and H thereof, and notice of the filing and entry of the same, respectively, be forthwith served upon said petitioner, Raladam Company; and

406 4. That this honorable court make and enter upon the pleadings, testimony, and proceedings set forth in said transcript of record its decree affirming respondent's said order to cease and desist, and directing said petitioner to comply therewith.

ROBERT E. HEALY,
Chief Counsel, Federal Trade Commission,
ADRIEN F. BUSICK,
Assistant Chief Counsel,
EDWARD J. HORNIBROOK,
Attorneys for Respondent.

407 [*Duly sworn to by Otis B. Johnson; jurat omitted in printing.*]

408–411 In United States Circuit Court of Appeals, Sixth Circuit

[Title omitted.]

Answer of the petitioner to paragraphs G and H of respondent's answer in nature of cross bill

Filed Nov. 16, 1929

The Raladam Company, the petitioner above named, in obedience to the order of the court heretofore entered herein that petitioner file a "reply or other pleading" to respondent Federal Trade Commission's "Answer in nature of cross bill," now comes and answers paragraphs G and H of respondent's said "Answer in nature of cross bill," said paragraphs G and H; together with paragraphs 2 and 4 of the prayer for relief, being the parts of said pleading that are in the nature of a cross bill, and said paragraph G and H
412 being the only parts of said pleading to which respondent prayed in said pleading that petitioner should be required to

answer. And answering said paragraphs G and H of respondent's said "Answer in nature of cross bill," which said paragraphs, together with the aforesaid paragraphs of the prayer for relief, are for convenience hereinafter referred to as respondent's cross bill, petitioner respectfully says:

I

Since respondent on, to wit, April 13, 1929, issued its order to cease and desist that is mentioned and set forth in the said cross bill, petitioner has made some changes in its advertising matter relating to its Marmola prescription tablets that are mentioned in the said cross bill. As a result of such changes the advertising matter relating to its said tablets which petitioner now publishes and seeks to publish, and since some time subsequent to the issuance of said order to cease and desist has heretofore published and sought to publish, is in some respects different from the advertising matter relating to its said tablets shown by the record now on file herein, which before, and at the time of, and for some time after, the issuance of the said order to cease and desist, petitioner published and sought to publish. For so long as petitioner continued, after the issuance of said order to cease and desist, to publish the same advertising matter relating to its said tablets that it had published, as shown by the record now on file herein, before the issuance of the said order, petitioner admits that petitioner violated the said order. Whether the changed advertising matter relating to its said tablets, which, as aforesaid, petitioner now publishes and seeks to publish, and since some time subsequent to the issuance of said order to cease and desist
413 has heretofore published and sought to publish, complies with or violates said order to cease and desist, is a matter of opinion. Petitioner's opinion is that although its said changed advertising matter relating to its said tablets is perhaps less repugnant in some respects to said order to cease and desist than was the advertising matter relating to its said tablets shown by the record now on file herein, nevertheless petitioner's said changed advertising matter fails to comply with, and so violates, said order to cease and desist in substantial particulars. In order, however, that the court may reach its own conclusion and form its own opinion in that regard, petitioner attaches hereunto as exhibits (infra, pp. 465–486), and hereby makes a part hereof, copies of advertisements containing petitioner's said changed advertising matter, said exhibits being marked, respectively, "1–a" to "1–r," both inclusive.

II

The fact that since respondent's said order to cease and desist was issued, as aforesaid, petitioner has changed its advertising matter relating to its said tablets to the limited extent to which, as aforesaid, it has changed such advertising matter is not properly to be taken or given effect as in any degree or to any extent an acquiescence

by petitioner in the issuance of said order, or in the terms thereof, or as an abandonment or waiver by petitioner of any of its objections to said order as set forth in its petition for review and in its motion heretofore filed herein. There was no causal connection whatsoever between the issuance of said order to cease and desist, standing by itself, and petitioner's changing its said advertising matter as aforesaid. Petitioner does not, and never did, intend even-
414 tually to obey or comply with respondent's said order to cease and desist, except to the extent, if any, to which this court shall finally decide that said order is lawful, and so ought to be obeyed. Petitioner's attitude and contentions are, as heretofore at all times they have been, that said order to cease and desist is wholly void and destitute of legal effect; and that petitioner is not under any duty or obligation to obey said order, or any part thereof; and the facts hereinafter pleaded and set forth show legal reasons, in addition to those disclosed by petitioner's aforesaid petition for review and aforesaid motion, for holding said order to cease and desist void and of no effect. To the extent that this court shall hold said order to cease and desist to be unlawful and void, petitioner intends to resume the use of the same advertising matter, which, as shown by the record herein, petitioner was using at and before the time when said order to cease and desist was issued. Petitioner changed its said advertising matter as aforesaid only as a temporary expedient, which was adopted by petitioner in an effort to preserve its business until this court could pass upon and determine the question of the lawfulness and validity of said order to cease and desist. The adoption of such expedient by petitioner was made necessary by the unlawful acts of the respondent that are hereinafter more particularly pleaded and set forth, which said unlawful acts threatened, and now threaten, the imminent destruction of petitioner's business altogether.

III

As is more particularly pleaded and set forth hereinafter, the respondent on, to wit, October 9, 1928, procured and brought
415 it about that certain publishers of various periodicals throughout the United States should, and the said publishers did, make and enter into an unlawful agreement, combination, and conspiracy in restraint both of interstate and intrastate trade, to which said agreement respondent was an initial party and to which said agreement a corporation named the National Better Business Bureau, and various local better business bureaus, and various other publishers besides the initially conspiring publishers, subsequently became additional parties. Said unlawful agreement, combination, and conspiracy provided in brief substance, among other things, as is more particularly pleaded and set forth hereinafter, that the confederated publishers who were parties thereto should submit to the exercise by respondent and by said National Better Business Bureau of censorship powers over advertising matter published by, or offered for

publication to, said confederated publishers, and that said confederated publishers should boycott, and should decline to render or perform any advertising service for, all such advertisers as respondent and said National Better Business Bureau, acting as censors as aforesaid, should direct.

IV

As appears more particularly and at large hereinafter, and especially from the facts pleaded and set forth in subdivisions 14, 15, and 16 of division VII of this answer (infra, pp. 440–443), even before respondent on, to wit, April 13, 1929, issued its aforesaid order to cease and desist against petitioner, respondent was actively and aggressively engaged, in cooperation with said National Better Business Bureau, under and in pursuance of the aforesaid unlawful agreement, combination, and conspiracy in restraint of trade, in
416 successfully bringing it about that periodical publishers, and particularly the respective publishers of two magazines of large circulation known, respectively, as Comfort and Screenland, should decline to publish petitioner's advertising matter shown by the record now on file in this court, relating to petitioner's said Marmola prescription tablets, upon the ground that said advertising matter was false and misleading. In view of that fact no other conclusion is possible than that respondent was biased and prejudiced against petitioner before the order to cease and desist was entered by respondent against petitioner on, to wit, April 13, 1929, and while the complaint in the proceeding that is now before this court for review was pending before, and undisposed of by, respondent; that respondent had prejudged the said complaint; and that petitioner did not have, and could not possibly have had, a fair and impartial hearing before respondent, and a fair and impartial consideration by respondent of the evidence bearing upon the truth or falsity of the said complaint. Once respondent had, as aforesaid, actively and aggressively engaged, in cooperation with said National Better Business Bureau, in successfully bringing it about that the said respective publishers of said Comfort and Screenland magazines, respectively, should decline to publish advertising matter offered by respondent relating to its said Marmola prescription tablets, respondent could not thereafter, without stultifying itself, do otherwise than issue its said order to cease and desist against petitioner. By reason of the fact that respondent was, as aforesaid, biased and prejudiced against petitioner, and had prejudged its said complaint against petitioner,
and did not and could not accord petitioner a fair hearing, all
417 as aforesaid, the said order to cease and desist that was finally issued by respondent against petitioner, on, to wit, April 13, 1929, was and is void, because repugnant to the requirement of Article VI of the articles in addition to, and amendment of, the Constitution of the United States, that "No person shall * * * be deprived of life, liberty, or property, without due process of law." And for this court to make and enter, as prayed in respondent's afore-

said cross bill, a "decree affirming respondent's said order to cease and desist, and directing said petitioner to comply therewith," or for this court to accord any weight whatsoever to said order to cease and desist, or to the respondent's findings of fact upon which said order is based, would deprive petitioner of life, liberty, and property without due process of law.

V

After respondent on, to wit, April 13, 1929, issued its aforesaid order to cease and desist against petitioner, and even after petitioner had on, to wit, May 16, 1929, filed its aforesaid petition for review in this court, respondent, and said National Better Business Bureau, and various local better business bureaus, unlawfully conspiring and acting together in concert, requested and brought it about that all of the confederated publishers who were parties to the aforesaid unlawful agreement, combination, and conspiracy in restraint of trade, and by unlawful threats and intimidation coercively brought it about that other publishers, also, should boycott petitioner as an advertiser, and should decline to publish any advertising matter relating to petitioner's said Marmola prescription tablets unless petitioner should comply with and obey said order to cease and desist,
418 in advance of a determination of the lawfulness and validity of said order by this court, at the petitioner's peril of the complete destruction of its business—through the impossibility, unlawfully created by respondent and those conspiring with respondent as aforesaid, of petitioner's obtaining any adequate advertising service in connection with its business—unless petitioner should comply with said order, regardless of the question whether the same was lawful and valid, or unlawful and void, and in advance of a determination of such question by this court. The said acts of respondent, in addition to being otherwise unlawful, were, and are, contemptuous of the dignity, and of the lawful powers, authority, and jurisdiction of this court, in that the natural and probable result, and hence inferably intended purpose, thereof was that, even after, and notwithstanding that, petitioner had filed its aforesaid petition for review in this court, respondent's said order to cease and desist should unlawfully have all the force and effect of, and should unlawfully operate as, an unsuperseded judgment of a court possessing complete judicial power, and that petitioner should be forcibly driven to yield entire and complete obedience to said order to cease and desist, lest otherwise, and before this court could act with reference to petitioner's said petition for review, petitioner's business should be completely destroyed, through the impossibility, unlawfully created by respondent and those conspiring with respondent as aforesaid, of petitioner's obtaining any adequate advertising service in connection with its said business, pending the disposition of petitioner's said petition for review in this court.

VI

Except for said unlawful acts of respondent, petitioner
419 would have continued to use, pending a final determination by this court of the validity and lawfulness of said order to cease and desist, the same advertising matter which as shown by the record herein petitioner was using before, and at the time of, the issuance of said order to cease and desist, and said publishers would have continued to publish such advertising matter for petitioner without any objection. By reason of said unlawful acts of respondent, and of those unlawfully conspiring with respondent, as aforesaid, petitioner was threatened with the complete destruction of its business, through the inability of petitioner to obtain publication of its advertising matter by the aforesaid publishers, during the period while the question of whether respondent's said order to cease and desist was or was not valid and lawful, and should or should not be complied with by petitioner was under consideration by this court. It was due to said unlawful acts of respondent, and to no other cause whatsoever, that petitioner has changed its advertising matter, to the extent that petitioner has changed it as aforesaid, since the issuance of said order to cease and desist; and said change of petitioner's advertising matter was made for the purpose of thereby seeking, without, however, any substantial success, to induce the said publishers to raise the said boycott to which, at respondent's unlawful instance and direction, they have unlawfully subjected petitioner, and to publish advertisements of petitioner's said Marmola prescription tablets during the period while the validity and lawfulness of said order to cease and desist were under consideration by this court, and for no other purpose whatsoever. Petitioner's business has been seriously injured, to petitioner's great financial loss and damage, by respondent's unlawful acts aforesaid. And, the premises considered, the fact that,
420 during the pendency of this cause, the petitioner has sought, by changing its advertising matter, as aforesaid, thereby to protect its business from complete destruction by the aforesaid unlawful acts of respondent, ought not to be taken or given effect as, in any degree or to any extent, an acquiescence by petitioner in the issuance of said order to cease and desist, or in the terms thereof, or as an abandonment or waiver by petitioner of any of its objections to said order as set forth in its aforesaid petition for review, or in its aforesaid motion, heretofore filed herein.

VII

Pleading and setting forth with greater particularity the aforesaid unlawful acts of respondent, petitioner says:

1. On October 9, 1928, respondent caused more than two hundred persons to convene in a meeting at the Waldorf-Astoria Hotel in New York City. Said persons represented the publishers of approximately six thousand (6,000) periodicals that were published through-

out the United States. Said meeting was called the Trade Practice Conference of the Publishers of Periodicals.

2. William E. Humphrey was on said October 9, 1928, and thence hitherto has continuously been, and now is, a member of respondent, and on said October 9, 1928, was the chairman of respondent. Said Humphrey, acting and professing to act in his official character and capacity of chairman of respondent, made the opening address to said conference of periodical publishers that was so convened, as aforesaid, on October 9, 1928. A true copy of said Humphrey's said opening address, marked "Exhibit 2," is hereunto attached (infra, pp. 487–495), and made a part hereof.

421 3. In his said opening address to said conference said Humphreys said to the there assembled representatives of periodical publishers:

"What, then, is the specific purpose of this conference? It is to have the publishers *agree* as to what they will do to find out whether or not an offered advertisement is false and misleading before it is published. That is exactly what we are here for." (Our italics.)

4. In telling the said publishers' representatives in said conference assembled what they ought to agree that publishers would do in order to find out, before an advertisement was published, whether such advertisement was false and misleading, said Humphrey in his said address in substance envisaged two classes of advertisements: (1) Advertisements that had been considered by respondent Federal Trade Commission in advance of their being offered to publishers for publication and had been condemned by respondent as false and misleading; (2) advertisements that had not been so considered in advance by respondent, and as to which respondent had not made any advance finding whether or not they were false and misleading.

5. As to advertisements that had been considered by respondent in advance of their being offered to publishers for publication and had been condemned by respondent as false and misleading, said Humphrey in his said opening address told the said publishers' representatives in substance and effect that they should agree that publishers would accept the view of respondent as to the false and misleading character of such advertisements as final and conclusive and that they would not publish any such advertisements. Said Humphrey

422 in his said opening address made the following statement to said publishers' representatives in that regard, to wit:

"Whether or not any advertisement you accept is in fact fraudulent and misleading is a matter for the commission [meaning respondent Federal Trade Commission] to decide."

6. As to advertisements that had not been considered by respondent in advance of their being offered to publishers for publication, and as to which respondent had not made any finding in advance as to whether or not they were false and misleading, said Humphrey in his said opening address told the said publishers' representatives, in substance and effect, that they should agree that publishers would exercise that degree of care which said Humphrey described in the

following language, in respect of determining whether any such advertisement was false and misleading, and accordingly should not be published, to wit:

"What plans and methods, what precautions will you take to ascertain the truth about an advertis'ment before giving it to your readers and publishing it to the world? That is the proposition. Of your combined wisdom and experience should be born plans and ways that will greatly help to bring about the consummation devoutly desired. Will you ascertain the financial liability of the advertiser? Will you inquire into his reputation and standing? Will you accept in certain cases testimonials of supposed patrons of such advertisers as conclusive? All these precautions are helpful, perhaps necessary, but added together they are not always sufficient to show that you had acted with reasonable prudence, particularly with reference to that class of advertisement which makes claims that are contrary to the ordinary experience of mankind. Your own ex-
423 perience and knowledge in regard to the truth of the promise held out by such advertisement is more to be relied upon than any so-called evidence the advertiser may produce. There is little excuse for a publisher being deceived by the crook and faker that present advertis'ment of this kind. The true test is to exercise such care as a reasonably prudent man under such circumstances would exercise *if his own interest were directly and vitally affected.* No exact rule nearer than that can be stated. In other words, *the precautions you would take to protect yourself*, measure the duty that you owe to the public and to those who patronize your advertisers." (Our italics.)

In view of other portions of said Humphrey's said opening address, which are quoted hereinbelow, the advice thus given by said Humphrey in the last above-quoted portion of his said opening address to said publishers' representatives, contained—in the words "if his own interest were directly and vitally affected," and in the words "the precautions you would take to protect yourself"—a subtle warning to said publishers' representatives that, if a publisher should be confronted with the question of whether or not he would publish an advertisement that had not been censored in advance by respondent, such publisher would be wise to take precaution to protect himself by considering that if he should publish such advertisement and respondent should disapprove of his action, his own interest would immediately become directly and vitally affected through respondent's subjecting him to attack by filing a complaint against him before respondent itself, at the hearing and determination of which complaint respondent itself would be both prosecuting advocate and judge. As appears with more particularity hereinafter,
424 said publishers' representatives, with the consent and approval of said Humphrey and of respondent commission, construed and interpreted said advice so given, and said recommendations so made, by said Humphrey, as aforesaid, as meaning that as to all advertisements that had not been censored by respondent, periodical

publishers would be agreeing to exercise that degree of care that said Humphrey advised, in respect of ascertaining whether any such advertisement was false and misleading before publishing the same, and would be safe from incurring the displeasure of and prosecution by respondent, if such publishers would agree to accept and act upon the judgment of a corporation named the National Better Business Bureau, acting as a censor, as to whether any such advertisement that had not been censored by respondent, was or was not false and misleading and should not, or should, be published accordingly.

7. By way of inciting and inducing publishers to agree to act agreeably to the recommendations that were made by said Humphrey in his said opening address as above quoted, said Humphrey in his said opening address made certain threats and promises set forth next hereinbelow. The said Humphrey threatened the said publishers' representatives, in substance, that if any publisher should contumaciously disregard said Humphrey's said recommendations such publisher would be subject to be lawfully proceeded against, and would be proceeded against, by respondent commission for using unfair methods of competition in commerce in violation of what is now U. S. Code, tit. 15, sec. 45. The language used by said Humphrey in his said opening address in that regard was:

425 "How can this gigantic evil of false advertising be suppressed? The Department of Justice, the Post Office Department, and the Federal Trade Commission have waged war unceasingly against it. But the result has been most unsatisfactory and discouraging. *What of the responsibility of the publisher?* He becomes part of the plan. Without his assistance the consummation of the scheme would be impossible. Knowingly or unknowingly the publisher helps rob the unfortunate victim. He brings the victim and the crook together. He shares in the ill-gotten gains. *In publishing such advertisement the publisher is violating the law. He is guilty of an unfair practice. In a suit by the Federal Trade Commission to suppress such advertising the publisher is not only a proper party but under recent decisions he is a necessary party. The commission, as a public duty that it is under every obligation to perform, should make the publisher a party to all suits against fraudulent advertising by publication. These facts in regard to their responsibility seem not to be generally understood by the publishers. This is the outstanding reason why the commission has called this conference.*" [Our italics.]

And the said Humphrey promised the said publishers' representatives, in substance, that if any publisher who should be offered for publication an advertisement that had not been censored by respondent in advance would exercise the degree of care and circumspection recommended by the said Humphrey as hereinabove quoted in determining whether or not to publish such advertisement, then respondent would deal discriminatingly, kindly, and tenderly with any such publisher in the event that respondent should conclude

that notwithstanding the exercise by such publisher of such
426 degree of care, such publisher had nevertheless, in fact, published an advertisement that was false and misleading, and should feel in duty bound to join such publisher as a codefendant in a proceeding brought by respondent against the advertiser who had brought about the publication of such advertisement, to compel such advertiser and such publisher to cease and desist from the further publication of such advertisement. The language used by the said Humphrey in his said opening address in that regard was:

"But in an action brought against the publisher and the advertiser charging them with false and misleading advertising, the publisher who shows that he used reasonable care to ascertain the truth will find the discretion of the commission exercised in his favor when it comes to taking final action in the matter. In other words, while the law may require that the publisher shall be made a party to such action, the commission in its discretion will see that the honest publisher receives the consideration to which he is entitled."

And the said Humphrey, by means of the said threat and the said promise so made to the said publishers' representatives in the said conference, as aforesaid, intimidated and cajoled and seduced the said publishers' representatives and the publishers whom they represented, into agreeing to do, and eventually into actually doing, all of that which said Humphrey so advised and recommended that said publishers should do, as aforesaid.

8. When said Humphrey made his aforesaid opening address to said publishers' representatives in said conference assembled, as aforesaid, it was false and untrue, and said Humphrey then well
427 knew that it was false and untrue, that, as said Humphrey then stated to the said publishers' representatives in the conference aforesaid: "In a suit by the Federal Trade Commission to suppress such advertising [meaning false and misleading advertising] the publisher is not only a proper party, but under *recent decisions*, he is a *necessary party*." (Our italics.) When said Humphrey made the said statement to the said conference, as aforesaid, there was not then, and there is not now, and said Humphrey well knew that there was not then, any "recent decisions," or any "decisions" or decision whatsoever to the effect that a publisher is a "necessary party," or even a "proper party," to a suit by respondent commission to suppress false advertising. Petitioner caused a request to be made of respondent on, to wit, May 25, 1929, and May 29, 1929, that respondent should supply specific information as to where such "recent decisions" as said Humphrey referred to, as above quoted, could be found, and respondent evaded and declined to answer said request. The facts in more detail in that connection are, that respondent, on, to wit, May 16, 1929, as a part, and in furtherance, of its effort mentioned hereinabove to prevent petitioner from obtaining any adequate advertising service in connection with petitioner's said business, proceeded, after the aforesaid order to cease and desist had been issued against petitioner by respondent, as aforesaid, to issue a notice to,

and to serve it upon, Kling-Gibson Company, an Illinois corporation, which was then and is now acting as petitioner's agent in seeking to procure the publication of advertisements relating to petitioner's said Marmola prescription tablets, a true copy of which said notice, marked "Exhibit 3," is hereunto attached (infra, pp. 495–497)
428 and made a part hereof. Said notice was dated May 16, 1929, and recited, among other things, in substance, that respondent had issued its aforesaid order to cease and desist against petitioner, and that complaint had been made to respondent that notwithstanding that said order to cease and desist had been issued against petitioner said Kling-Gibson Company was nevertheless engaging in procuring the publication and circulation through various newspapers, magazines, and periodicals, of false and misleading advertisements relating to petitioner's said Marmola prescription tablets, the publication and circulation of which advertisements had been forbidden by said order to cease and desist. The said notice stated, in substance, that respondent would hold an informal hearing on June 7, 1929, at which hearing said Kling-Gibson Company could show cause, if any cause there was, why complaint should not issue against Kling-Gibson Company, or why said Kling-Gibson Company should not be made a party defendant with petitioner in any and all complaints issued, or to be issued, by respondent against petitioner. The said notice requested said Kling-Gibson Company to notify respondent whether said Kling-Gibson Company would be present, in person or by representative, at said hearing on said June 7, 1929. Respondent had no power or authority, and respondent well knew that it had no power or authority, to proceed against said Kling-Gibson Company for acting as petitioner's advertising agent in procuring the publication of advertisements that were deemed by respondent to be false and misleading relating to petitioner's said Marmola prescription tablets, whether by filing a separate and independent complaint against said Kling-Gibson Company, or by making said Kling-Gibson Company a party to any complaint that respondent had issued, or might
429 thereafter issue, against petitioner, or in any other manner whatsoever. The sending of said notice by respondent to said Kling-Gibson Company, with its implied threat that respondent would proceed against said Kling-Gibson Company unless the latter should cease procuring the publication of advertisements in petitioner's behalf, was nothing more nor less, and respondent knew that it was nothing more nor less, than an unlawful, arbitrary, and oppressive attempt by respondent to intimidate said Kling-Gibson Company into refusing to continue to act as petitioner's advertising agent, with a view to thereby further disabling petitioner to obtain adequate advertising service in its said business. Said Kling-Gibson Company declined, however, to be intimidated by respondent. On May 25, 1929, said Kling-Gibson Company sent respondent a telegram, which referred to respondent's aforesaid notice of May 16, 1929 (Exhibit 3 aforesaid) and also to said Humphrey's opening address (Exhibit 2 aforesaid) to the conference of publishers' representatives held at

the Waldorf-Astoria Hotel in New York City on October 9, 1928, as aforesaid, and was as follows:

"This refers to your number one dash five four naught seven, being a notice of hearing dated May sixteenth, calling upon us to show cause June seventh why we should not be joined as respondent in proceedings by you against Raladam Company and Stuart Company, respectively Stop In an address delivered by your chairman, Honorable W. E. Humphrey, at the trade practice conference of the publishers of periodicals at the Waldorf-Astoria Hotel, New York City, on October ninth, nineteen twenty-eight, he said (quote): What of the responsibility of the publisher? He becomes part of the plan. Without his assistance the consummation of the scheme
430 would be impossible. Knowingly or unknowingly the publisher helps rob the unfortunate victim. He brings the victim and the crook together. He shares in the ill-gotten gains. In publishing such advertisement the publisher is violating the law. He is guilty of unfair practice. In a suit by the Federal Trade Commission to suppress such advertising the publisher is not only a proper party but under recent decisions he is a necessary party (end quote). *Please wire us at our expense explicit references to the recent decisions referred to by your chairman in his said address.* Stop You may count on my presence at hearing."

(Signed) "LEROY A. KLING,
"*President Kling-Gibson Company.*"

[Our italics.]

In answer to said telegram so sent by said Kling-Gibson Company to respondent on May 25, 1929, as aforesaid, respondent on May 27, 1929, sent said Kling-Gibson Company a telegram, which was signed "Culver" and was as follows:

"Legal questions raised your wire twenty-fifth may be discussed at hearing.

In answer to said telegram so sent by respondent, over the signature "Culver," to said Kling-Gibson Company on May 27, 1929, as aforesaid, said Kling-Gibson Company on May 29, 1929, sent respondent a telegram as follows:

"Referring your reply signed Culver to my wire of twenty-fifth to you, I respectfully renew my request for explicit references to decisions referred to in my wire of twenty-fifth to you. I wish to examine those decisions in preparation for my appearance before you to show cause on June seventh obediently to your notice dated
431 May sixteenth. *I consider it a minimum requirement of fairness on your part that you give me the references requested immediately and that your further withholding them will be arbitrary and oppressive.* Please wire answer my expense."

(Signed) "LEROY A. KLING,
"*President Kling-Gibson Company.*"

[Our italics.]

Respondent never replied to said telegram last above quoted. Neither did respondent ever carry out its threat contained in its aforesaid notice of May 16, 1929, to institute proceedings against said Kling-Gibson Company or to make said Kling-Gibson Company a party to proceedings against petitioner. Neither did said Kling-Gibson Company ever cease to act as petitioner's advertising agent as aforesaid, nor did it ever discontinue or abandon its efforts to obtain the publication of the advertisements relating to petitioner's Marmola prescription tablets, the publication of which respondent had forbidden in and by its said order to cease and desist. And petitioner says that when said Humphrey, as aforesaid, made his aforesaid statement to the aforesaid conference to the effect in substance that under "recent decisions" the publisher of a false and misleading advertisement was not only a "proper party" but a "necessary party" to a suit by respondent to suppress the publication of such advertisement, well knowing, as aforesaid, that said statement was wholly false and untrue, said Humphrey then knowingly and intentionally and wantonly, wickedly, and unlawfully imposed upon, tricked, misled, and deceived the said publishers' representatives in the said conference assembled, and also the publishers whom they represented, into agreeing to do, and eventually into actual doing, all of that which said Humphrey so advised and recommended that said publishers should do, as aforesaid.

432 9. When said Humphrey made his aforesaid opening address to said publishers' representatives in said conference assembled, as, aforesaid, it was not the law, and said Humphrey then well knew that it was not the law, that, as said Humphrey then stated to the said publishers' representatives in the conference aforesaid: "Whether or not any advertisement you accept is in fact fraudulent and misleading, is a matter for the commission to decide." The commission can not "decide" anything. At the utmost, the commission can not do more, by entering an order to cease and desist, or by any other means, than to express its view, as an administrative body, in respect of the matter to which its order to cease and desist relates; and such view is wholly provisional in character, "decides" nothing, is conclusive as to nothing, binds nobody, and may lawfully and properly be completely disregarded and altogether ignored by everybody, from the instant it is announced, continuously thereafter, until and unless a court of appeals shall "decide" that such view is correct, and shall "decide" and order that the commission's order to cease and desist should be obeyed. Neither, when said Humphrey made his aforesaid opening address, was it then the law, and said Humphrey then and there well knew that it was not the law, that, as said Humphrey then stated to the said publishers' representatives in the conference aforesaid: "In publishing such advertisement [meaning a false and misleading advertisement] the publisher is violating the law. He is guilty of an unfair practice." The statute does not purport to declare, and no court has ever decided, and respondent has

never asked any court to decide, that a publisher who publishes a false and misleading advertisement for an advertiser, is just as
433 guilty as the advertiser, or guilty at all, of using unfair methods of competition in commerce. And in and by falsely making said statements to said publishers' representatives in said conference, which he did as aforesaid, said Humphrey thereby further knowingly and intentionally, and wantoly, wickedly, and unlawfully imposed upon, tricked, misled, and deceived the said publishers' representatives in the said conference assembled, and the publishers whom they represented, into agreeing to do, and eventually into actually doing, all of that which said Humphrey so advised and recommended that said publishers should do as aforesaid.

10. The said publishers' representatives in the said conference assembled, being as aforesaid intimidated by the said threats, and cajoled and seduced by the said promises, and imposed upon, tricked, misled, and deceived by the said false statements that were so made to them by the said Humphrey as aforesaid, did agree each with every other and with the said Humphrey, and with respondent, for themselves, and for the publishers whom they represented, with reference to the matter as to which the said Humphrey desired that they should agree, namely, as to what they would do to find out whether an offered advertisement was false and misleading before it was published. The agreement so made by the said publishers' representatives was, in substance, this: (1) That as to any advertisement offered for publication to any publisher, which had been considered by respondent Federal Trade Commission, and had been condemned by respondent as fraudulent and misleading, the censorship so exercised by respondent should be final and conclusive, and the publishers would accept and abide by the respondent's declaration as to
434 the character of such advertisement, and would not publish the said advertisement; (2) that as to all advertisements offered for publication, which had not been so censored as aforesaid by respondent in advance of being offered for publication, the publishers would establish a censorship, and would make the National Better Business Bureau the censor of all such advertisements, and would abide by the decision of said National Better Business Bureau as to what advertisements were false and misleading and should not be published. And for the purpose of evidencing said agreement in part, and of establishing a censorship, and of making said National Better Business Bureau the censor, in respect of all advertisements offered for publication which had not been censored by respondent in advance of being offered for publication as aforesaid, the said publishers' representatives, in said conference assembled, on, to wit, October 9, 1928, for themselves, and for the publishers whom they represented, adopted a resolution in the following words and figures, to wit:

"Whereas at this conference on trade practice for periodicals, held in response to the call of Hon. W. E. Humphrey, chairman of the Federal Trade Commission, Chairman Humphrey said in part:

* * *. The majority of periodical publishers not only obey the law but often go far beyond what the law requires in selecting the advertisements they will publish. * * * I do not believe there is an industry in America conducted by more honest, high-minded, public-spirited men and women than the publishing industry. I do not believe that any industry in America has greater power for good. * * * I believe that the future greatness and security of the Nation rests to a greater extent upon the publishing industry than probably any other.'

"Be it resolved, That we express our sincere appreciation of
435 such commendation, from so high an official and personal source, of the principles and conduct of the publishing industry; and

"Whereas the record of the publishing industry for many years past shows that the very great majority of such publishers have of their own initiative taken measures to eliminate fraudulent advertising from their columns and have welcomed every practical suggestion to increase the efficiency of such measures.

"Be it resolved, That we recognize the fact that the National Better Business Bureau, an organization composed of and supported by the businesses of advertising, is the most competent agency of assistance to the businesses of advertising in preventing frauds in advertising and selling; and that said bureau has expressed its willingness to cooperate in every way with publishers in eliminating fraudulent advertising; and

"Be it further resolved, That we desire and will welcome every cooperation and assistance of the National Better Business Bureau; and said bureau having expressed its willingness and ability to do so, that we request said bureau to advise periodical publishers generally, and whenever deemed advisable any governmental agency, whenever advertising which is being published, or is likely to be offered for publication, is established by said National Better Business Bureau to be fraudulent upon reasonable investigation and notice to the person complained of."

11. Said resolution so adopted by said publishers' representatives in said conference assembled, as aforesaid, on, to wit, October 9, 1928,
was thereafter submitted by the officers of said conference to
436 respondent Federal Trade Commission for its approval and acceptance, and said resolution was approved and accepted by respondent as evidencing and constituting an agreement satisfactory to respondent as to what periodical publishers throughout the United States should do to find out whether or not an offered advertisement that had not been censored by respondent in advance was false and misleading before it was published. The making of the agreement aforesaid and the adoption of the aforesaid resolution in and by which said agreement in part is evidenced was the making of an unlawful agreement and the forming of an unlawful combination and conspiracy in restraint of interstate and intrastate trade and commerce, in violation of the laws of the United States and the laws

of the State of New York. Thereafter a copy of said resolution was sent to substantially all of the publishers of periodicals throughout the United States with a request that said publishers approve the said resolution, and a very large number of said publishers approved the said resolution and adhered thereto, and thereby became parties to the aforesaid unlawful agreement, combination, and conspiracy in restraint of trade. Respondent, as will appear more fully and at large from the facts more particularly pleaded and set forth hereinafter, has participated in carrying out, and has made use of the unlawful agreement that was so entered into, as aforesaid, and has made use of and has participated in carrying out the said resolution, and has assisted and made use of the censorship established and the censor and censorship powers created by said resolution, to the end of disabling petitioner to obtain adequate advertising service in connection with its aforesaid business; and respondent has thereby violated the laws of the United States and of the several States.

437 12. Said National Better Business Bureau is a corporation organized not for profit. There are in various cities throughout the United States local better business bureaus which also are corporations organized not for profit. There exists an affiliation and a close working interrelationship between said National Better Business Bureau and said local better business bureaus, and said local better business bureaus cooperate with said National Better Business Bureau in carrying into effect the policies adopted and dictated by said National Better Business Bureau. Said local better business bureaus have cooperated with and assisted the said National Better Business Bureau and respondent, to enable said National Better Business Bureau effectually to exercise and enforce the censorship powers in respect of advertising matter that were conferred upon said National Better Business Bureau by the aforesaid resolution quoted hereinabove.

13. Prior to the issuance by respondent on, to wit, April 13, 1929, of its said order to cease and desist, said National Better Business Bureau in, to wit, March, 1929, as a step in exercising the censorship powers that had been conferred upon it by the resolution aforesaid, formulated and distributed to periodical publishers throughout the United States a plan or program in accordance with which said National Better Business Bureau proposed to exercise said censorship powers that had been so conferred upon it as aforesaid. In its said plan or program said National Better Business Bureau listed, as first to be censored, advertisements relating to "fat-reducing medicinal drugs" and "medicinal drugs" containing "glands," which classification covered advertisements relating to petitioner's, Marmola prescription tablets. Said plan or program provided that said

438 National Better Business Bureau should cooperate with, and should receive the cooperation and assistance of, respondent Federal Trade Commission, and of the publishers of periodicals whose representatives, assembled in the conference aforesaid, adopted the resolution aforesaid. The said plan or program so formulated

and distributed by said National Better Business Bureau as aforesaid was as follows:

"First. The bureau shall investigate, by defined classifications, periodicals advertising which, from examination, appears to be seriously deceptive or fraudulent. In the main this advertising will consist of purported remedies, appliances, etc., which are detrimental to public health and welfare. These are divided into five groups:

A. *Medicinal drugs—*
Fat reducing.
Glands.
Asthma.
Piles.
Female weakness.
Bladder.
Also fits, stomach troubles, colds, goitre, dropsy.

B. *External health and beauty appliances—*
Facial skin cures.
Bone straighteners.
Hair dyes.
Fat reducing.
Bust developers.
Baldness.
Rupture.
Deafness.
Hair removers.
Also piles, eyelash growers, panaceas, leg sores, rheumatism, corns, bunions, optical.

439 C. *Tobacco cures.*

D. *Jewelry.*

E. *Puzzles.*

"In this phase of the program the bureau will major in one classification at a time and, when complete information has been obtained, will make it available to publishers and the *Federal Trade Commission.*

"Second. The main operating program of the bureau consists of programs pertaining to defined industrial lines whereby standards of practice are provided and transgressions, deceptive or fraudulent in character, are defined and eliminated. This type of operation removes many undesirable practices among advertisers of legitimate products and is of practical value in assisting *the censorship of periodical publishers.*

"Third. Specific complaints not included in the bureau's defined industrial programs, which are called to its attention, shall be investigated and if the investigation develops practices of fraud which can not be eliminated by adjustment, periodical publishers and the *Federal Trade Commission* will be so advised.

"Fourth. If satisfactory adjustment can not be obtained from publishers on advertising of a fraudulent character, a formal com-

plaint will be presented to the *Federal Trade Commission* by the bureau. (Such action is incumbent upon the bureau under the resolution passed by the publishers.)

"Fifth. It is desirable that the *Federal Trade Commission cooperate with the periodical publishers and the bureau to make the agreement obtained at the trade practice conference effective*
440 by advising the bureau of its complaints involving periodical publishers on fraudulent advertising.

"Sixth. The bureau will welcome suggestions to make more effective the resolution consummated by the publishers." (Our italics.)

14. Even before the issuance by respondent on, to wit, April 13, 1929, of its aforesaid order to cease and desist against petitioner and while the proceeding by respondent against petitioner that is now before this court was still pending before and formally undisposed of by respondent, the said National Better Business Bureau and respondent began so to exercise the powers of censorship that the resolution aforesaid had vested in the said National Better Business Bureau, as to coerce various periodical publishers throughout the United States into declining to publish advertisements offered by petitioner relating to its said Marmola prescription tablets and into declining to supply to petitioner advertising service in connection with petitioner's said business.

15. Prior to the issuance by respondent on, to wit, April 13, 1929, of its said order to cease and desist, petitioner, by and through its aforesaid agent, Kling-Gibson Company, in, to wit, March, 1929, sought to renew a contract then about to expire for the publication of advertising matter relating to petitioner Raladam Company's said Marmola prescription tablets in a periodical of large circulation known as Comfort, or the Comfort Magazine, which was then, and is now, published at Augusta, Maine. The said magazine declined to renew said contract, and in giving its reason for so declining wrote petitioner's said agent, said Kling-Gibson Company, under date of March 11, 1929, as follows:

441 "We are returning herewith renewal contract for Raladam Company. Your present contract for this advertiser expires with our April issue now on the press. *In view of recommendations of National Better Business Bureau and the Federal Trade Commission we can hardly do otherwise than to decline for the present, at least, to carry this advertising.* You may be sure that we appreciate your consideration of our magazine." [Our italics.]

The refusal of said magazine to renew its said contract with petitioner was caused and brought about by the exercise by said National Better Business Bureau, with the active cooperation and assistance of respondent, of the censorship powers conferred upon said National Better Business Bureau by the aforesaid unlawful agreement, combination, and conspiracy in restraint of trade, and by the resolution aforesaid.

16. Prior to the issuance by respondent on, to wit, April 13, 1929, of its said order to cease and desist, petitioner, by and through its

aforesaid agent, Kling-Gibson Company, sought to arrange for the continued publication of advertising matter relating to its said Marmola prescription tablets in a periodical of large circulation known as Screenland, which was then, and is now, published in New York City. The company which publishes the said magazine declined to continue publishing the said advertising matter, and the vice president of the said company, Mr. J. M. Hopkins, in giving the reasons for said company's so declining, wrote petitioner's said agent, said Kling-Gibson Company, under date of April 8, 1929, as follows:

"Many thanks for your very interesting letter received this
442 morning, together with exhibits. So that you will understand fully the position of Screenland Magazine, I am going to give you all the facts in the case. About ten days or two weeks before I joined this organization *the publishers of Screenland were asked to appear before the Federal Trade Commission.* The publication was represented by eminent counsel, who, after hearing all the evidence concerning certain advertisers who were using Screenland, agreed that the publication would, from that time on, eliminate certain accounts. Among them was Marmola. When your letter was received this morning, together with the exhibits, I asked Mr. Craig, our advertising manager, to take it all to the *Better Business Bureau* and go over the matter fully. Mr. Craig, upon his return, told me that he had decided Screenland should not carry the advertising. Based on the evidence before me, there is nothing else to do but leave it out. But so that you won't get the impression I am passing the buck in this matter, I agree perfectly with both our counsel and Mr. Craig that the advertising should be left out. *We are given to understand that publishers accepting same may expect to face some difficulties in the near future.* Regretting that such an incident should happen between our office and that of the Kling-Gibson Company, and hoping you will realize the position we are in, I am," etc. (Our italics.)

The decision of said magazine to eliminate advertisements relating to petitioner's said Marmola prescription tablets and the refusal of said magazine to continue to publish such advertisements in the future, as it had in the past, were caused and brought about by the exercise by said National Better Business Bureau, with the active cooperation and assistance of respondent, of the censorship powers conferred upon said National Better Business Bureau by the
443 aforesaid unlawful agreement, combination, and conspiracy in restraint of trade, and by the resolution aforesaid. And the insistence by respondent that said Screenland should not publish any advertisement relating to petitioner's said Marmola prescription tablets was continuous, as appears from a further letter which on September 3, 1929, the said Screenland wrote to petitioner's said advertising agent, Kling-Gibson Company aforesaid, as follows:

"We regret exceedingly that we must return the enclosed contract for the Raladam Company. About 10 days ago the *Federal Trade Commission* sent out a bulletin which contained a reference to Screen-

land that was not at all creditable, and we are now awaiting their reply to our defense. In view of the above, won't you please excuse us from carrying the advertising of your client until the Raladam Company have won their case before the Court of Appeals. *Screenland Magazine cannot afford to be made a defendant with too many advertisers in the suits instituted by the Federal Trade Commission.* The order you have sent us will, however, act as a rate holder during the coming year, so that when you win your suit your copy can run all during 1930 at our present rate. P. S.—The cut for the above advertising has just been received. We are returning this to you under separate cover." (Our italics.)

17. After respondent on, to wit, April 18, 1929, had issued its aforesaid order to cease and desist against petitioner, the Cleveland Plain Dealer, the Milwaukee Journal, and Picture Play—as appears from copies of letters marked, respectively, "Exhibit 4," "Exhibit 5," and "Exhibit 6," hereunto attached (infra, pp. 497–499) and made a part hereof—yielded to the censorship established, as aforesaid, by the aforesaid resolution and the aforesaid unlawful
444 agreement, combination, and conspiracy in restraint of trade, and, at the instance of respondent, said National Better Business Bureau, and various local business bureaus, declined to publish further advertising matter relating to petitioner's said Marmola prescription tablets.

18. On May 9, 1929, said National Better Business Bureau, with a view to overcoming such resistance as it was meeting from periodical publishers in the exercise of the censorship powers that had been conferred upon it by the aforesaid unlawful agreement, combination, and conspiracy in restraint of trade, and the aforesaid resolution, sent to periodical publishers throughout the United States a copy of a letter which on May 6, 1929, the aforesaid Humphrey, a member, as aforesaid, of respondent, Federal Trade Commission, had written and sent to said National Better Business Bureau. Said letter written by said Humphrey to said National Better Business Bureau on May 6, 1929, was as follows:

"Replying to your communication with reference to Marmola, will say that *it is my intention to file application for complaint against all publications that publish the advertisement of Marmola*, unless they express an intention to discontinue it at once. *You are at liberty to notify any of your publisher clients to this effect.*" (Our italics.)

Said letter was written and sent by said Humphrey to said National Better Business Bureau, as aforesaid, with the intent that such letter should be used, and the same was used, by said National Better Business Bureau, in the exercise of the censorship powers that had been conferred upon it by the aforesaid resolution, and to the
445 end that said National Better Business Bureau, by having and publishing said letter, should thereby be the better enabled, and it was thereby the better enabled, to cudgel and coerce periodical publishers into declining to publish the advertising matter

that was then being offered by petitioner relating to petitioner's said Marmola prescription tablets, in the hope, and with the purpose, that petitioner would thereby be driven to comply with the said order to cease and desist that had theretofore been issued by respondent, as aforesaid. Said letter, so written by said Humphrey to said National Better Business Bureau, as aforesaid, was subsequently, in, to wit, June, 1929, communicated—either verbatim or in substance, as is set forth more particularly hereinafter in subdivision 22 of this division VII of this answer—to substantially all of the publishers of newspapers of any consequence in the United States.

19. After said National Better Business Bureau had sent out the aforesaid letter written by the said Humphrey, as aforesaid, the Daily Oklahoman, the Oklahoma City Times, the Columbus Dispatch, the Ohio State Journal, the Cincinnati Times-Star, and the Portland News—as appears from copies of letters marked, respectively, "Exhibit 7," "Exhibit 8," "Exhibit 9," "Exhibit 10," and "Exhibit 11," hereunto attached (infra, pp. 496-502), and made a part hereof—were intimidated and put in fear by the aforesaid threat contained in the said Humphrey's aforesaid letter, and being so intimidated, yielded to the censorship established, as aforesaid, by the aforesaid resolution and the aforesaid unlawful agreement, combination, and conspiracy in restraint of trade, and at the instance of respondent the said National Better Business Bureau and various local business bureaus declined to publish further advertising matter relating to petitioner's said Marmola prescription tablets.

446 20. Not all publishers of periodicals throughout the United States yielded, however, with the alacrity and to the extent desired by respondent, to the exercise of the censorship established, as aforesaid, by the aforesaid resolution and the aforesaid unlawful agreement, combination, and conspiracy in restraint of trade. The Portland News, aforesaid, as appears from its aforesaid letter (Exhibit 11, infra, pp. 501, 502), was slow and reluctant to yield to the said censorship. And, as appears from the copy of a letter marked "Exhibit 12," hereunto attached (infra, pp. 502, 503), and made a part hereof, the Evening Bulletin, published at Philadelphia, Pennsylvania, offered even stronger resistance to the said censorship.

21. The said Humphrey, in his official capacity of member of respondent, Federal Trade Commission, on June 3, 1929, made an address before the National Association of Purchasing Agents at Buffalo, New York, in and by which he sought—by again falsely stating, in substance, that respondent, Federal Trade Commission, had lawful power to institute proceedings before itself against any periodical publisher who should publish any false advertisement, and proceedings against any such publisher—thereby to intimidate such proceedings against any such publisher—thereby to intimidate such of the periodical publishers in the United States as were then still offering resistance to the exercise of the censorship powers that had been conferred upon the said National Better Business Bureau, as censor by the resolution aforesaid, and to frighten and coerce such

publishers into abandoning their said resistance, and into passing docilely and submissively under the yoke of the said censor. In his said address said Humphrey referred to the aforesaid con-
447 ference of publishers' representatives that had been held, as aforesaid, on October 9, 1928, and said in part:

"The people of this country are annually robbed of hundreds of millions of dollars by false and misleading advertisements appearing in the newspapers and magazines. Some of the more glaring instances of this class of advertising might be cited: Those holding out alluring promises of lucrative employment; patent-medicine advertisements for incurable diseases, frequently injurious, never of any value, and often holding out false hopes, prevent the victim from seeking any real relief until too late; various methods for correcting bodily deformities; beauty creams and various rejuvenating cosmetics—all of them *frauds* and *swindles*, and *perhaps the greatest of all just at the present moment are the various antifat remedies*, appliances, soaps, belts, machines, powders, and medicines, *all of them fakes and all of them dishonest—and some of them dangerous. Fabulous sums are spent for these frauds since the female skeleton has become the fashion in this country.* Hair restorers, one of the worst, most intriguing, and aged frauds * * *.

"The magazines are filled with this class of advertisements I have mentioned. The Department of Justice, the Post Office Department, and the Federal Trade Commission have all been trying to put these frauds out of business. But the result has been disappointing. We have accomplished comparatively little. Such advertisers are fleeting and cunning crooks, and when proceeded against they fold their tents and silently steal away and commence their fraudulent work in some new locality under a new name. These scoundrels and thieves annually rob the poor, the ignorant, the sick, the afflicted, and the credulous of not less than five hundred million dollars annually.
448 "For the last two years in various speeches *I have been calling attention to the liability of the publisher—that he is equally guilty with the advertiser, that he is a necessary part of the plan, that he brings together the crook and his prey, that he helps rob the victim, that he shares in the ill-gotten gains. I have insisted that he is responsible and that he be made a party to the suit against the advertiser. In this position I received the approval and the assistance of many of the foremost publishers in the country.* The result was that the periodical publishers of the country, representing over 6,000 periodicals, met in a conference in New York, over which I had the honor to preside, and voluntarily and unanimously adopted a plan which, I have a firm conviction, will do more to clean the columns of the magazines of this country of this shameless advertising than any other and all plans put together that the Government has ever yet tried.

"This plan in no degree interferes with the freedom of the press. It in no degree increases the jurisdiction of the commission. It in no degree increases the responsibility of the publisher. The law

makes the publisher responsible for any false and misleading advertisements he may carry in his columns. The publisher has no more right to rob the public than the advertiser, and his responsibility is not lessened because he does it in conjunction with the advertiser. The publisher, like every other man, must take the responsibility of conducting his business according to law. We ask only that the publisher obey the law. Rightly or wrongly, the public believes that the publisher guarantees the honesty of his advertisers. In this belief the public pays its money to the advertiser, and often commits to him things more valuable than money. This places upon the publisher extraordinary duties and responsibility to the public.

449 "*Most publishers realize these duties and responsibilities and are cooperating with the commission in its campaign to wipe out false advertising.* It may interest you to know that we have within the past three weeks proceeded against more than two hundred of these fakers and scoundrels, and the publications that publish their advertisements. So far, we have not found a single one of these crooks that will come out into the light of publicity and make a fight. We are going to continue to fight these crooks as long as they continue to swindle and rob the public. We are going to fight these fakers and crooks and thieves until they are put out of business. In this fight we have the help of every honest and decent publisher in the country. In this fight we believe we have the support of every decent and honest citizen."

"The conference in which the publishers promised to clean their columns of such advertisements was held last October. They have had sufficient time to carry out the promises they there publicly made to the public and to their competitors. The magazines with few exceptions have kept their promises made at that conference and are cleaning their own columns of this criminal filth. *Some few are not keeping their promises. We are going to force decency upon these few. We are going to clean their house for them. I take this opportunity to give fair notice to all publishers and all advertising agencies that hereafter they must be prepared to defend all advertisements that they handle of the class I have described before the Federal Trade Commission* and before the bar of public opinion." [Our italics.]

22. Within a short time after said Humphrey made his said address to said National Association of Purchasing Agents at Buffalo,
450 New York, on June 3, 1929, as aforesaid, the substance of the letter quoted hereinabove in subdivision 18 of this division VII of this answer—which said Humphrey had, as aforesaid, written and sent to said National Better Business Bureau on May 6, 1929, and said business bureau had, as aforesaid, sent to periodical publishers throughout the United States on May 9, 1929—was communicated to substantially all of the publishers of newspapers of any consequence in the United States. On June 5, 1929, the Southern Newspaper Publishers' Association, of which substantially all publishers of newspapers of any consequence in the southern part of the

United States are members, sent a bulletin to all of its members, in which bulletin the following appeared:

"MARMOLA ADVERTISING.—The National Better Business Bureau has been advised by Chairman W. E. Humphrey, of the Federal Trade Commission, as follows: 'Replying to your communication with reference to Marmola, will say that it is my intention to file application for complaint against all publications that publish the advertisement of Marmola unless they express an intention to discontinue it at once. You are at liberty to notify any of your publisher clients to this effect.'"

On June 14, 1929, the American Newspaper Publishers' Association, of which substantially all publishers of newspapers of any consequence elsewhere in the United States than in the southern part of the United States are members, sent a bulletin to all of its members in which the following appeared:

"Federal Trade Commission and Marmola.—Under date of May 9th, Chairman Humphrey, of the Federal Trade Commission, advised the National Better Business Bureau that it
451 was his intention to file application for complaint against all publications that published the advertising of Marmola unless they express intention to discontinue at once."

Respondent and said National Better Business Bureau incited and brought about the inclusion, in the respective bulletins aforesaid, of the respective statements just above quoted from the said bulletins, respectively, with the intent and purpose of thereby further threatening and intimidating publishers of newspapers throughout the United States, and so inducing them to yield more compliantly and completely to the exercise of the censorship powers conferred upon said National Better Business Bureau by the resolution aforesaid, and frightening said publishers into declining to publish advertisements relating to petitioner's said Marmola prescription tablets.

23. After said Humphrey had made his aforesaid address before said National Association of Purchasing Agents at Buffalo, New York, on June 3, 1929, as aforesaid, containing threats, as above set forth, and said Southern Newspaper Publishers' Association on June 5, 1929, and said American Newspaper Publishers' Association on June 14, 1929, had respectively sent out bulletins, as aforesaid, containing threats, as above set forth, the Youngstown Vindicator, published at Youngstown, Ohio, the People's Home Journal and the Press Telegram, published at Long Beach, California, were intimidated by the said threats, and, as appears from copies of letters marked, respectively, "Exhibit 13," "Exhibit 14," and "Exhibit 15," hereunto attached (infra, pp. 503–505) and made a part hereof,
452 yielded to the censorship established, as aforesaid, by the aforesaid resolution and the aforesaid unlawful agreement, combination, and conspiracy in restraint of trade, and at the instance of respondent said National Better Business Bureau and various local business bureaus declined to publish further advertising matter relating to petitioner's said Marmola prescription tablets.

24. On September 28, 1929, respondent, Federal Trade Commission, by Otis B. Johnson, its secretary, supplied to the Southern Newspaper Publishers' Association aforesaid a statement in writing, which statement said Southern Newspaper Publishers' Association on, to wit, September 30, 1929, distributed in writing to all of its members. Said statement differed in one particular from the letter which, as stated hereinabove in subdivisions 18 and 22 of this division VII of this answer, said Humphrey, as a member of respondent, Federal Trade Commission, had written on May 6, 1929, to said National Better Business Bureau, and said National Better Business Bureau and said Southern Newspaper Publishers' Association had distributed verbatim, and said American Newspaper Publishers' Association had distributed in substance, to publishers of periodicals and newspapers throughout the United States. In his said letter of May 6, 1929, which was written before petitioner, on, to wit, May 16, 1929, had filed its petition for review in this court, said Humphrey had threatened, in substance, that if any publisher should publish any advertisement relating to petitioner's said Marmola prescription tablets, respondent, Federal Trade Commission, would file a complaint against such publisher immediately after the publication thereof. In the statement in writing that respondent, by its said secretary, supplied to said Southern Newspaper Publisher's Association on
453 September 28, 1929, as aforesaid, respondent threatened, in substance, that if while petitioner's said petition for review was pending before, and was undisposed of by, this court, any publisher should publish any advertisement relating to petitioner's said Marmola prescription tablets that contained any statement the publication of which was forbidden by respondent's said order to cease and desist issued against petitioner, as aforesaid, no complaint would be filed by respondent against such publisher while petitioner's said petition for review was pending before and undisposed of by this court; but that if, after the publication of such advertisement containing such statement, this court should eventually decide that so much of respondent's said order to cease and desist as forbade the publication of such advertisement containing such statement was lawful and valid, then, after this court should have so decided, the respondent would immediately file complaints against any and all publishers that had published such advertisement before such decision had been handed down by this court. Said threat so made by respondent in its said statement in writing that, by its said secretary, it so supplied to said Southern Newspaper Publishers' Association on September 28, 1929, was just as effectual, and was intended by respondent to be just as effectual, as had been the said letter written by said Humphrey to said National Better Business Bureau on May 6, 1929, as aforesaid, to intimidate and coerce publishers into a craven and unqualified acceptance of respondent's view, embodied in its said order to cease and desist, that petitioner's advertisements relating to its said Marmola prescription tablets were false and misleading and fraudulent, and into declining to publish petitioner's said advertise-

ments, in advance of a determination by this court of the ques-
454 tion whether said order to cease and desist was lawful and valid or was otherwise, and of the question whether petitioner's said advertisements were false, misleading, and fraudulent, or were otherwise. Said statement so supplied by respondent, by its said secretary, to said Southern Newspaper Publishers' Association on September 28, 1929, was false, and was known by respondent to be false, in the representation which it made, by direct and necessary implication, that respondent had lawful power and authority whereby, if this court should decide that respondent's said order to cease and desist issued against petitioner was lawful and valid, respondent could, after the handing down of such decision, then file an effectual complaint against any publisher who, before the handing down of such decision, had published an advertisement relating to petitioner's said Marmola prescription tablets that had been interdicted and forbidden by said order to cease and desist. Said statement so supplied by respondent, by its said secretary, to said Southern Newspaper Publishers' Association on September 28, 1929, was an effort to mislead and deceive newspaper publishers into the belief that the issuance by respondent of an order to cease and desist was a judicial act and that such an order, while under review by this court, had the same effect, and was entitled to receive the same respect and obedience, as a reviewable but unsuperseded judgment or decree of a lawfully constituted court: and was an effort, by falsehood and trickery, to substitute government by respondent by administrative fiat, for and instead of orderly government by due process of law. Said statement so supplied by respondent, by its said secretary, to said Southern Newspaper Publishers' Association was as follows:

455 "Docket 1496, Raladam Company. This is in reply to your letter of the 25th instant and your telegram of the 28th instant, in the matter of the above case. You will remember that the Raladam Company sought a review in the United States Circuit Court of Appeals for the Sixth Circuit of the order to cease and desist issued against it by the Federal Trade Commission. This suit is now with the court which has authority to affirm, modify, or set aside the commission's order. Decision by the court is not expected before January 1, 1930. In the meantime it is my understanding that no action will be taken by the commission against Raladam Company or publishers who publish advertisements of Marmola, but I am informed that *should the court sustain the action of the commission application for complaints will be immediately filed against all publishers of Marmola advertisements.*" (Our italics.)

25. The boycott of petitioner as an advertiser by publishers throughout the United States has become substantially complete, due to the efforts of respondent and said National Better Business Bureau and said local better business bureaus, acting under and in furtherance of the aforesaid unlawful agreement, combination, and conspiracy in restraint of trade and the aforesaid resolution. On September 30, 1929, Messrs. Woodward & Kelly—representing the

respective publishers of the following newspapers, in soliciting and seeking to obtain advertisements for publication in the said newspapers respectively, to wit, the Chicago Daily News, the Cleveland Plain Dealer, the New York Herald Tribune, the Philadelphia Inquirer, and the Richmond Times-Dispatch—wrote to petitioner's said advertising agent, Kling-Gibson Company aforesaid, a letter as follows:

456 "Re RALADAM COMPANY. For some time I have been trying to get my papers to give these people the benefit of any doubt However, I have not been successful, as *all of the local better business bureaus have done their work in scaring the papers from accepting this business.* Therefore, much as I hate to do it, I will have to return your very kind contract. The Cleveland Plain Dealer returned this contract to you on September 24, saying that they would not accept it. I have had correspondence with them since then but have been unable to get them to accept it. P. S.—Just received a letter from Mr. E. I. Bacon of the Philadelphia Inquirer as follows: 'Will you be good enough to advise Kling-Gibson that there is nothing further we can add to what we have already told them in reference to the Marmola account. *We do not believe it advisable to insert this advertising until the matter has been finally disposed of by the Federal Trade Commission.*'" (Our italics.)

The Aurora Beacon News, published at Aurora, Illinois, the Muncie Star, published at Muncie, Indiana, and the Milwaukee Herold, as appears from copies of letters marked, respectively, "Exhibit 16," "Exhibit 17," "Exhibit 18," and "Exhibit 19," hereunto attached (infra, pp. 505–507), and made a part hereof, and very many other newspapers, magazines, and periodicals, in addition to those hereinabove expressly mentioned by name, have also yielded to the censorship established, as aforesaid, by the aforesaid resolution and the aforesaid unlawful agreement, combination, and conspiracy in restraint of trade, and at the instance of respondent, said National Better Business Bureau, and various local better business bureaus have declined to publish any advertising matter relating to petitioner's said Marmola prescription tablets.

457 VIII

The acts hereinabove pleaded and set forth that were so done and performed, as above averred—in part by the said publishers' representatives who were assembled in conference, as aforesaid, at the Waldorf-Astoria Hotel in New York City on, to wit, October 9, 1928, and by the said publishers who subsequently ratified and adopted the acts and doings of the said representatives; in part by said Humphrey; in part by said National Better Business Bureau and in part by the local better business bureaus aforesaid; and in part by respondent, Federal Trade Commission, and by said Otis B. Johnson, the secretary thereof—were all done and performed in flagrant violation of the statute, commonly known as the Sherman law, which de-

clares that every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States is illegal, which said statute was in force when said acts were so done and performed, as aforesaid, and is now in force as U. S. Code, Tit. 15, sec. 1, and in flagrant violation, also, of the respective so-called antitrust laws of many of the several States of the United States.

IX

All of the said acts that were so done by the parties aforesaid in violation of the statutes aforesaid were parts of one single and entire unlawful conspiracy which was conceived, initiated, and organized by said Humphrey, as aforesaid, acting as a member and for and in behalf of respondent.

458

X

The agreement which, at the instigation and solicitation of said Humphrey, as aforesaid, was entered into, as aforesaid, by said publishers' representatives at their said conference on, to wit, October 9, 1928—as such agreement was, and is, in part evidenced by the aforesaid resolution whereby censorship powers were conferred upon said National Better Business Bureau, as aforesaid—was and is repugnant to the said Sherman law and to the rule of reason. Said agreement was and is, in substance and effect, that neither the publishers' representatives who first entered into such agreement, nor the publishers who subsequently ratified and adopted it and undertook to be bound by it, would trade at all, or have any commerce whatsoever, with any advertiser seeking publication of advertisements relating to the goods that he offered for sale and sought to sell in commerce, if either respondent, Federal Trade Commission, or the said National Better Business Bureau should forbid trading or having commerce with any such advertiser, upon the ground that the advertisements, of which he sought to obtain publication, were false and misleading and fraudulent. Said agreement was and is in substance and effect an agreement in advance on the part of publishers who initially became or have since become parties thereto that they would boycott any advertiser whom the respondent and the said National Better Business Bureau, or either of them, should dictate. Although it is right and reasonable that advertisements that are fraudulent in fact and in law should not be published in magazines, newspapers, or other periodicals, it is neither right nor reasonable that the question

459 of whether any given advertisement is fraudulent in fact and in law should be left to the decision of a body, such as is the respondent, Federal Trade Commission, and is also the National Better Business Bureau, which is destitute of judicial power, and is not required to be learned in the law, or to know what is essential, and what insufficient, to constitute fraudulent advertising as a matter of law, or what limits the law imposes, and what latitude it allows,

in respect of statements made by a trader in his advertising matter with reference to his goods. It is neither right nor reasonable that a confederated organization, and machinery, should be set up whereby an effectual and ruinous publishers' boycott may be established, as it has been established against petitioner, as a sanction for the fiat of respondent and of said National Better Business Bureau, respectively, as to what advertisements are to be denied publication as fraudulent in fact and in law, and as a means of coercing and compelling obedience to such fiat. It is neither right nor reasonable that, even in the interest of a piously proclaimed purpose to prevent false, misleading, and fraudulent advertising, a confederated organization, and machinery, should be set up whereby censorship powers which not even Congress or the legislatures of the several States could lawfully and constitutionally exercise or grant to anybody, may be, and are, effectually exercised by respondent and by said National Better Business Bureau, respectively, in respect of traders' statements in their advertising matter with reference to their goods. It is neither right nor reasonable that any confederated organization, or any machinery, should be set up whereby obedience on the part of a trader to an order to cease and desist issued by the Federal Trade Commission may be exacted and coerced, on peril of the destruction of
460 such trader's business if he fails to yield obedience to such order, in advance of the handing down by a court of lawful jurisdiction of a decision that such order is lawful and valid and should be obeyed. Congress saw fit to withhold from the Federal Trade Commission all power to enforce its orders to cease and desist. It is neither right nor reasonable that any confederation of publishers, or any machinery for establishing a boycott, or any censorship, should be established to enable the respondent, Federal Trade Commission, to arrogate to itself and to usurp arbitrary and tyrannical power to give to its orders to cease and desist a potency and a force which otherwise, and under the law, they would wholly lack.

XI

All of the acts that were done, as aforesaid, by the parties aforesaid, subsequent to the making of the aforesaid agreement by the said publishers' representatives on, to wit, October 9, 1928, were done in furtherance of, and for the purpose and by way of carrying out, the aforesaid agreement, which was unlawful, as aforesaid. Except for the doing of said acts, said agreement would have been innocuous; the censorship that it enabled to be exercised against petitioner would never have been in fact exercised, nor would the publishers' boycott that was in fact established against petitioner, because of its failure to change its advertising matter so as to meet and satisfy the dictate of those who were exercising said censorship, ever have been established. On the other hand, except for the existence of the unlawful agreement aforesaid, and the confederacy of publishers which it represented, the said unlawful acts that have been done to petitioner's

great injury as hereinabove set forth, would never have been
461 done; the doers of such acts, except for said unlawful agreement and confederacy, would have seen no prospect that the doing of such acts would be coercive of petitioner, and so would have had no sufficient motive or incentive to do them—and that includes respondent's act of issuing its order to cease and desist against petitioner, which respondent never would have issued if respondent had contemplated confining itself to merely such means and measures as the statute authorizes, in order to obtain the enforcement of said order to cease and desist. All of the acts hereinabove pleaded and set forth from the making of said unlawful agreement on, to wit, October 9, 1928, down to and including the last act done in an effort to prevent the publication of petitioner's advertisements in the form in which it tendered them for publication, were closely articulated parts of one single and entire conspiracy, which was wholly unlawful, as aforesaid.

XII

It was not until, to wit, September 7, 1929, that petitioner completely effected the changes that petitioner has made, as aforesaid, in its said advertising matter relating to its said Marmola prescription tablets, for the purpose of thereby trying, as aforesaid, to protect its said business against, and to prevent the complete destruction of its said business by, the aforesaid unlawful acts of respondent and of the National Better Business Bureau and of the local better business bureaus, and of the confederated publishers, aforesaid. From the severely injurious effect which said unlawful acts had upon petitioner's said business petitioner became aware as early as, to wit, June 7, 1929, that it would be necessary for petitioner to change its said advertising matter, as aforesaid, so as if possible
462 thereby to bring about the lifting of the unlawful boycott that had been unlawfully imposed upon petitioner and upon the publication of petitioner's advertising matter, as aforesaid, by the aforesaid unlawful acts of the persons aforesaid, if petitioner would, and to the end that petitioner thereby possibly might, preserve its said business from complete destruction by said unlawful acts, until such time as this court could consider the lawfulness and validity of the aforesaid order to cease and desist issued by respondent, as aforesaid, and could declare the said order to be unlawful and void. Petitioner does not, however, compose its own advertising matter, but employs a person engaged in the occupation of composing advertising matter to perform that service for petitioner. Said person was engaged as early as, to wit, June 7, 1929, in revising petitioner's said advertising matter for the purpose aforesaid, but did not complete his said revision until, to wit, September 7, 1929. The changes that petitioner made in its said advertising matter, as aforesaid, for the purpose aforesaid, proved to be ineffectual to bring

about the lifting of the said boycott that had been unlawfully imposed upon petitioner, and upon the publication of petitioner's advertising matter relating to its said Marmola prescription tablets, by the aforesaid unlawful acts of respondent and of said business bureaus and of said publishers. Petitioner found that, due to said unlawful acts and said boycott, it was substantially as impossible for petitioner to obtain advertising service in connection with its said business after it had revised its said advertising matter, as aforesaid, as before.

463 Wherefore, having fully answered respondent's said cross bill, petitioner prays:

1. That respondent be required to make full, true, and direct reply to this petitioner's answer to respondent's said cross bill, admitting or denying, or confessing and avoiding, each and every allegation hereof, but not under oath, a reply under oath being hereby expressly waived.

2. That respondent's said order to cease and desist be adjudged and decreed to be wholly unlawful, void, and destitute of legal effect.

3. That respondent's said cross bill be dismissed.

[SEAL.] RALADAM COMPANY,
By ADENE MOSS,
Its President.

STEVENSON, BUTZEL, EAMAN & LONG,
Attorneys for Petitioner.

464 [*Duly sworn to by Adene Moss; jurat omitted in printing.*]

465 *Exhibit 1–a*

(See p. 413, supra)

Thank You

FOR TRYING MARMOLA PRESCRIPTION TABLETS

Here We Tell You What to Expect

Also the Formula

PLEASE READ

We feel a responsibility to those who buy Marmola and we wish them to know all the facts at our command. Here we present them, and we urge every user to read them. You should know what to expect, and why to expect it. You should know what you are taking, and why. This little pamphlet will tell you in the best way we know. Please read it.

RALADAM COMPANY

General Motors Building, Detroit, Mich.

Canadian branch, Walkerville, Ont.

DIRECTIONS

Take one Marmola tablet after each meal and one at bedtime—four a day. Do this regularly. Try not to miss a dose, for the cumulative effects are important.

This dosage is not intended to lead to rapid reduction. It will rarely exceed 3 or 4 pounds a week. Most authorities advise a moderate rate of reduction, so the body and skin may adapt themselves to the new conditions. One reason for this is the avoidance of wrinkles.

The rate of reduction differs with individuals. Habits also affect it. So it is hard to state in a general way what the user may
466 expect. To some results appear rapid, to others slow. Physicians in treating obesity often prescribe much larger doses of the Marmola factors. That is to hasten effects. But the consensus of opinion is that the dosage we direct, if taken regularly, seems to best fit the average case.

Do not permit interruption until the results are complete. If another box is needed, get it before this is gone. One may need to start all over if this isn't done.

HOW QUICK?

Fat reduction under the Marmola treatment does not usually start at once. It may take a few days—even up to two weeks—to get things started in the right direction. But the start, when it comes, means much.

The chief purpose of Marmola is to feed and stimulate the thyroid gland, which controls the combustion of food in the body. It is also the main inspiration of other ductless glands. The object is to aid in turning more food into energy and heat and less into fat, thus restoring a natural condition. This somewhat resembles the use of cod liver oil in conditions of underweight. The main results are not direct, but they come through changing wrong conditions and tendencies.

So please do not be impatient. If you are overfat you probably have an under-active thyroid. Restoring that activity may mean much to you in other ways than fat reduction. Many remarkable things are accomplished in these days by stimulating the ductless glands.

DIET AND EXERCISE

The makers of Marmola do not advise abnormal exercise or diet. Abnormal exercise in an obese condition may overtax the heart.

Starvation diet may lead to malnutrition. Much harm has been done through attempted reduction in these ways.

But there is no question that reasonable habits in these respects greatly aid results. No matter how the thyroid may be stimu-
467 lated and the combustion of food increased, it is possible to offset much of the benefit by too-lazy habits and too much food.

Marmola is intended to aid reduction without radical or unpleasant methods. Use of our ingredients is based on scientific facts. It embodies the chief factors, if not the only factors, employed by modern physicians for the purpose intended. That is, for correcting a thyroid deficiency.

The Marmola prescription is based on years of work here and abroad by scientists in the field of glandular therapy. Reports of this research work show that results were first proved on thousands of test animals, then on human beings. Marmola itself has been proving them for 22 years to countless men and women. The results and the reasons for them are well understood in the scientific world of to-day.

But underexercise and overfeeding naturally retard results. They may, in extreme cases, counteract them. So normal activity, like walking, is suggested but not anything too strenuous. Moderation in the use of fat-forming foods will aid what you are seeking.

SUGGESTIONS

Avoid starches and sweets in excess. Starchy foods include bread and potatoes. Cut down fatty foods. Instead of them, eat poultry, game, eggs, lean meat, clear soups, fish, and sea foods. All kinds of fruits and fresh vegetables are good for you. Eat all you want of them. But be sparing of foods with high-calory content, like sugar, cereals, and fat.

If the use of Marmola tends to reduce the desire for fat-forming foods, or even your appetite, it is probably because those foods, being more largely turned into energy and heat, satisfy one more quickly. Greater energy, when it develops, leads naturally to greater activity. Satisfy that desire by walking. That is good for you at all times, for it supplies oxygen to the blood. But it is usually wise for the overfat to avoid any violent exercise.

468 Chew all foods well—even your soups. A good rule is to chew all foods until they slip down without swallowing. At every meal eat a little less than you think you need. These things are suggested to hasten the results you seek.

WRONG CONCEPTIONS

It is found that many have the impression that Marmola does something to destroy fatty tissue. There is no such effect. Every result of Marmola comes in a natural way. Just as natural as the results of exercise or diet.

Excess fat may be consumed by certain activities, particularly gland activities. It may be consumed by exercise. Or it may be consumed as food for the body if you fail to eat enough. That is how fat disappears when there is no wasting disease. Those are the natural ways.

The Marmola prescription contains desiccated thyroid taken from food animals. It is a concentrated food intended for weak thyroids, particularly when that weakness shows itself in obesity. The object is to restore a normal condition under which few people gain too much weight.

Many people with deficient thyroids gain fat whatever they do. Some are very active, some are small eaters. Yet they suffer the deformity of fat. Many people with over-active thyroids stay thin, however much they eat or rest. The object of Marmola is to help establish a normal gland condition.

HAVE CONFIDENCE

There is a time in starting Marmola when confidence is quite important. Gland conditions cannot be corrected over-night.

Confidence should be based on the fact that Marmola contains the leading internal factor in fat reduction known to modern science.

That factor is recognized the world over. No modern physi-
469 cian can dispute it. You have probably read articles by physicians in magazines, stating how an active thyroid affects fat.

You should also have confidence because Marmola is prepared in a world-famous laboratory. The doctors and scientists in that laboratory are among America's leaders in gland therapy. They have devoted decades to its study.

Then Marmola has been used for 22 years—millions of boxes of it. Today the use is larger than ever before. That use has grown and grown, largely through what users tell to others. It is utterly impossible for anything to live and prosper that long without serving its purpose well.

Slender figures have become the vogue. Excess fat is not nearly so common as it was. You see that everywhere. Millions of men and women, in the past few years, have escaped the deformities of fat. That fact is leargely due to the factors in Marmola, either taken in this way or on physicians' prescriptions.

This form of treatment is recognized by authorities the world over. Physicians have watched its effects for many years and in myriads of cases. One specialist in obesity whom we have largely consulted has records on 4,000 cases, covering nearly every type and condition. You can well have confidence in a help which has thus stood the test of decades.

WHEN TO STOP

The chief object of Marmola is to help correct thyroid deficiency. When that result shows in normal weight, it is well to stop Marmola. You neither wish to be abnormal nor subnormal in respect to fat.

A table in this pamphlet tells your proper weight. The time required differs with conditions. Some people need little, some much. Stop when you are satisfied; then, if you start to gain again, take Marmola a while longer. Stop again when conditions are corrected.

You will probably find that the use of Marmola brings you new vim and vitality. That is because the thyroid influences other ductless glands. But our advisers do not recommend the taking of Marmola for that purpose after the weight becomes normal. They do not favor any form of over-stimulation. Excess in all things should be avoided. Stop when the trouble is corrected, just as you stop any treatment.

WHY REDUCE?

Women reduce for appearance, men for efficiency. But doctors know far greater reasons for reduction.

They know that excess fat crowds all the organs, especially the heart. They know that forcing the blood through so much extra tissue is a tax on the heart. They know the dangers so well that life insurance companies spend vast sums to warn their policy holders against excess fat.

Obesity is more than a deformity, more than a blight on activity. It is now regarded in the light of a disease. When you see a person over-fat you know that something is abnormal, and people dislike the abnormal.

There is just as much reason for ending fat as for ending any other disease. A deficient thyroid leads to other deficiencies. It is not a matter of choice, nor a question of beauty. Excess fat practically forbids a long life or a full life.

We love slender figures just as we love rosy cheeks or bright eyes, or any other sign of good health. Among people who know, the neglect of obesity is unthinkable.

TELL YOUR FRIENDS

When Marmola brings the results you wish, tell others. Do this in kindness to your friends. Marmola could never have done the good it has done if users failed to do that.

You see people all about you suffering from excess fat. Not so many as you once saw, but enough. Women who have lost their youth and charm, men who have lost efficiency.

Don't hesitate to tell them what you did. Then hand them one of these little books to explain the action of Marmola.

471 **THE FORMULA**

We state here all the ingredients of Marmola. We do this so you may know just what you are taking, and your physician may know if you wish.

This prescription is based on 22 years of experience. It is prepared for us in a world-famous medical laboratory. The study has been to adapt it to the average case. It is based on the opinion that a moderate rate of reduction serves the purpose best.

Formula

1 grain	Extract bladderwrack.
½ grain	Extract phytolacca.
¼ grain	Extract cascara sagrada. Rx. 87 spec.
½ grain	Desiccated thyroid.
¼ grain	Phenolphthalein.
16/1000 min.	Oleoresin ginger.
	Po. Saccharum special.
3 grains	Calcium carbonate precipitated.
½ min.	Methyl salicylate.
½ min.	Oil anise.
½ min.	Oil sassafras.
	Talc brown.
	Ivory black
	Aqua for extracts.
	Po. burnt umber.
	Red oxide of iron.
	Syrupus simplex.
	Lubricating solution.
	Aqua for granulating.
	Liquid petrolatum colorless.

ORDER FROM DRUGGIST

Please order Marmola from your druggist, not direct. Druggists object when we supply their customers. It is very important
472 to all concerned that druggists carry stocks of Marmola. Otherwise there would be intervals in the treatment and delays. Patronize the druggist who serves you by keeping Marmola on hand.

Consult your own physician if you want special advice in any unusual condition. The Marmola prescription, made for the multitudes, considers the average person simply seeking to reduce. A physician, in extreme cases, might hurry the treatment. Or he might add certain factors. But that requires personal contact. If you desire more advice than we give you in this book, get it from a man who can meet you. We do not prescribe in special cases by letter.

VERY IMPORTANT

The Right Laxative

The right laxative is one essential in this form of reduction when a laxative is needed. The bowels should move once or twice a day, and the movements should be complete. The method employed should not interfere with Marmola.

Marmola contains some laxative, but many users require some additional help. That help should accord with this prescription and its purposes. So the great laboratory which compounds Marmola has prepared a laxative to go with it. It is called Dilaxin. The druggists who supply Marmola supply Dilaxin also—at 25 cents a box.

Dilaxin is an ideal laxative for anybody at any time. It is designed for natural action. Children should employ it. But it is particularly important to those who are using Marmola and who seek its full effects.

So we urge that you use this particular laxative—Dilaxin—while you are using Marmola. It does not interfere. But you can also use it for anybody at any time when a laxative is needed. We believe you will do that when you know it, for Dilaxin is ideal.

Dilaxin is designed for an eight-hour effect—an overnight effect—without griping or irritation. And without combating any Marmola effects. Do this for best results.

AVERAGE WEIGHT ACCORDING TO HEIGHT

Figures compiled by the Association of Life Insurance Medical Directors and Actuarial Society of Amer ica, as given in the World Almanac and Encyclopedia for 1922, page 705. These weights are with shoes on and without coat and vest, which weigh from 3 pounds to 7 pounds.

MEN

Height	Ages							
	15 to 19	20 to 24	25 to 29	30 to 34	35 to 39	40 to 44	45 to 49	50 to 54
5 ft.	113	119	124	127	129	131	134	135
5 ft. 1 in.	116	121	126	129	131	134	136	137
5 ft. 2 in.	119	124	128	131	133	136	138	139
5 ft. 3 in.	121	127	131	134	136	139	141	143
5 ft. 4 in.	124	131	135	137	140	142	144	145
5 ft. 5 in.	128	135	138	141	144	146	148	149
5 ft. 6 in.	132	139	142	145	148	150	152	153
5 ft. 7 in.	136	143	146	149	152	154	156	157
5 ft. 8 in.	140	148	150	154	157	159	161	162
5 ft. 9 in.	144	150	154	158	162	164	166	167
5 ft. 10 in.	148	154	158	162	167	169	171	172
5 ft. 11 in.	152	158	162	166	172	175	177	178
6 ft.	156	162	166	170	176	181	183	184
6 ft. 1 in.	161	166	170	175	180	187	190	191
6 ft. 2 in.	166	173	181	186	191	194	197	198

AVERAGE WEIGHT ACCORDING TO HEIGHT—Continued

474 WOMEN

Height	Ages							
	15 to 19	20 to 24	25 to 29	30 to 34	35 to 39	40 to 44	45 to 49	50 to 54
4 ft. 11 in.	110	113	116	119	122	126	129	131
5 ft.	112	115	118	121	124	128	131	133
5 ft. 1 in.	114	117	120	123	126	130	133	135
5 ft. 2 in.	117	120	122	125	129	133	136	138
5 ft. 3 in.	120	123	125	128	132	136	139	141
5 ft. 4 in.	123	126	129	132	136	139	142	144
5 ft. 5 in.	126	129	132	136	140	143	146	148
5 ft. 6 in.	130	133	136	140	144	147	151	153
5 ft. 7 in.	134	137	140	144	148	151	155	157
5 ft. 8 in.	138	141	144	148	152	155	159	162
5 ft. 9 in.	141	145	148	152	156	159	163	166
5 ft. 10 in.	145	149	152	155	159	162	166	170
5 ft. 11 in.	150	153	155	158	162	166	170	174
6 ft.	155	157	159	162	165	169	173	177

DILAXIN

The Approved Laxative

Dilaxin is a laxative made especially to be taken with Marmola, but it is an ideal laxative for anyone. Every tablet comes wrapped in waxed paper to preserve its strength and purity.

Practically all druggists sell—

Marmola at $1.00 per box.

Dilaxin at 25c per box.

Most people should take both.

Do not, while taking Marmola, use a laxative which conflicts.

475 Any druggist can supply you both. If he runs out of either, his jobber can supply him very quickly. There is no excuse for not keeping you supplied.

RALADAM COMPANY

Detroit, Mich.

Canadian branch, Walkerville, Ont.

476 *Exhibit 1–b*

(See p. 413, supra)

Once FAT

but now SLENDER

You see them daily

Ask them why

THIS is to the many slender people who have learned the right way to fight fat. Tell your friends about the method, as someone told you, perhaps. It will mean a kindness which no friend forgets.

Science has found that a common cause of obesity is an under-active gland. That gland largely controls nutrition. When it falls down, too much food goes to fat. So modern physicians combat excess fat by feeding the lacking substance.

That is what Marmola does. A famous medical laboratory prepares these tablets, so that all may employ this method in the right way at small cost. A book in each box states the formula and explains the good results.

Marmola has for 22 years, by sheer merit, held the top place in this field. Millions of boxes have been used. New youth and beauty, new vigor and health have come in this way to many. In any circle one can now see how slenderness prevails.

Now we ask those happy people to tell others. Ask them to try Marmola and watch results. Tell them that starvation is not necessary, not safe. Show them the right way. Urge them to start at once.

Marmola prescription tablets are sold by all druggists at $1 a box. Any druggist who is out will gladly order for you.

MARMOLA

PRESCRIPTION TABLETS

The Right Way to Reduce

Exhibit 1–c

(See p. 413, supra)

HOW STARS FIGHT FAT

NO STARVING

MOVIE stars must stay thin. That's a part of their contract. But they dare not starve to do it, for that might wreck their health.

They consult the best physicians. And those physicians know that a common cause of excess fat is an under-active gland. In treating obesity or fighting obesity, they supply that lack as they find it.

The method they employ is embodied in Marmola prescription tablets. A famous medical laboratory prepares them to serve the purpose in an ideal way. The formula is in every box. All the good results are explained. Thus this modern method is brought to the masses at a modest cost.

Marmola has been used for 22 years—millions of boxes of it. Users have told the results to others, until Marmola has long held the top place in its field.

Excess fat blights youth and beauty, health and vigor. It is often caused by a lacking gland secretion, easily supplied. Why not learn—and at once—how much this scientific method can serve you. There are people in every circle who can tell you what it does. Go try Marmola, and watch the results for a little while. You will be delighted.

Marmola prescription tablets are sold by all druggists at $1 a box. Any druggist who is out will gladly order for you.

MARMOLA

PRESCRIPTION TABLETS

The Pleasant Way to Reduce

477 *Exhibit 1–d*

(See p. 413, supra)

END FAT

THE WAY IS SHORT AND EASY

MOST women in these days know the right way to fight fat. Some are told by their physicians, some by friends. And for 22 years millions have been reading about Marmola. Those who starve to reduce, or who don't reduce, form a small minority now.

This has come about since science discovered a great cause of excess fat. It lies in an under-active gland. All the world over, they who treat obesity now aim to correct that cause.

The method they use is embodied in Marmola prescription tablets. People have used them for 22 years—millions of boxes of them. They have told the results to others. So the changed conditions seen today are largely due to Marmola.

A book in each box of Marmola gives the formula and explains the reasons for all good results. When you gain new youth and beauty, new health and vigor, you know why. No abnormal exercise or diet is advised. This modern method combats the cause.

Marmola has for many years held top place in this field. Anyone who is over-fat should test it, in justice to herself. It is not only the easy but the right way to reduce. Learn how much it means to you. Start now.

Marmola prescription tablets are sold by all druggists at $1 a box. Any druggist who is out will gladly order for you.

MARMOLA

PRESCRIPTION TABLETS

The Right Way to Reduce

Exhibit 1–e

(See p. 413, supra)

Fat Folks Eat Less Than the Thin

A Gland Is Weak

VERY often we find that fat people eat less than thin people. They are naturally careful in their diet. So it is evident, generally, that something else causes excess fat. There is usually an under-active gland. Modern physicians, in treating obesity, seek to supply the deficiency.

The factor they use is embodied in Marmola prescription tablets. It largely explains the results. A book in each box of Marmola gives the formula and states why it leads to reduction.

Marmola is prepared in a famous medical laboratory, to deal in the right way with excess fat. People have used it for 22 years—millions of boxes of it. They have told the results to others, until people now employ it in a larger way than ever.

Do what those people have done. Don't starve, don't over-exercise. There is danger in both. Let Marmola supply the gland factor which is probably too scant. Watch the results for a little while, in lower weight, new health and vitality. Those results will tell you if this is the right way for you.

Do this for your own sake, for your family and friends. If your condition is abnormal, correct it. Go try Marmola now

Marmola prescription tablets are sold by all druggists at $1 a box. Any druggist who is out will gladly order for you.

MARMOLA

PRESCRIPTION TABLETS

The Pleasant Way to Reduce

478 *Exhibit 1–f*

(See p. 413, supra)

2 WAYS TO FIGHT FAT

MAKE YOUR CHOICE

THERE is no doubt that starvation with severe self-denial can diminish fat. But the results are often worse than the fat.

Countless people have in late years found a better way. Modern science discovered it, modern physicians employ it. In every circle one can see the results. Excess fat is disappearing fast.

Research has discovered that most fat people suffer from an under-active gland. That gland largely controls nutrition. The modern method is to correct the deficiency, and thus turn more food into fuel and energy.

A famous medical laboratory embodies the method in Marmola prescription tablets. People have used them for 22 years—millions of boxes of them. Users have told others, and the use has spread. The changes you see on every hand are due largely to Marmola.

The method is well-known. Physicians the world over employ it. Each box of Marmola contains the formula, also the reasons for results. So every user knows.

If you are over-fat and unhappy, or starving to reduce, you owe to yourself a test of Marmola. You owe it to your family and friends. Combat the cause, then watch results, as others have done for so long. Let Marmola itself convince you. Read the book in the box. Life may be longer and finer. Go start today.

Marmola prescription tablets are sold by all druggists at $1 a box. Any druggist who is out will gladly order for you.

MARMOLA

PRESCRIPTION TABLETS

The Right Way to Reduce

Exhibit 1–g

(See p. 413, supra)

One Starves

And Stays Fat

One Eats

And Keeps Thin

YOU see that everywhere. Most fat people are careful of their diet. Many are active. Yet they see plenty who stay slender while eating what they wish.

Some years ago, science found the reason in an under-active gland. That gland largely controls nutrition. Since then, physicians the world over have fed that gland substance in treating obesity.

Marmola prescription tablets, prepared by a famous laboratory, contain that factor at its best. People have used them for 22 years—millions of boxes of them. All can see in every circle how conditions have changed in that time. Only a small percentage now stay over-fat.

Marmola is not secret. Each box contains the formula and the reasons for results. Users know why this is the right way. No starvation is required, though moderation helps.

Perhaps you have found that self-denial fails to make you slender. If so, try Marmola, which has done so much for so many, for so long. Watch the results. They will quickly tell you if this is what you need. Then go on until you reach the normal weight desired. For your own sake, start today.

Marmola prescription tablets are sold by all druggists at $1 a box. Any druggist who is out will gladly order for you.

MARMOLA

PRESCRIPTION TABLETS

The Pleasant Way to Reduce

479 *Exhibit 1–h*

(See p. 413, supra)

Stays Fat
YET SHE EATS LIKE A BIRD

HERE'S the REASON

MANY fat people deny themselves year after year, yet stay fat. Many injure themselves in the process. It is time they know what millions know, including all modern physicians. A common cause of excess fat lies in an under-active gland. And that fat will not disappear until this wrong condition is corrected.

Marmola prescription tablets contain the best factors now employed. A famous laboratory prepares them. The formula appears in every box, also the scientific reasons for results.

People have used Marmola for 22 years —millions of boxes of it. Users everywhere now show and tell the amazing and delightful results. They do not starve or over-exercise. They combat the cause by feeding a gland factor which is scant, and which largely controls nutrition.

Why not do what so many have done, with such good results, for so long. Learn by a test what this method does, then carry it as far as you wish. Do this in fairness to yourself, to please your family and friends. Then tell others who need this help. Go start today.

Marmola prescription tablets are sold by all druggists at $1 a box. Any druggist who is out will gladly order for you.

MARMOLA
PRESCRIPTION TABLETS
The Right Way to Reduce

Exhibit 1–i

(See p. 413, supra)

Fat Folks
now not urged to Starve

Countless people now reduce without starving. You see them everywhere —slender, vigorous and youthful. They combated the cause of excess fat, which usually lies in an under-active gland.

Modern physicians, in treating obesity, feed the lacking substance. The chief factors they use are embodied in Marmola prescription tablets, prepared by a famous laboratory. So all may use this modern method at small cost.

For 22 years Marmola has held its high place as a remedy for fat. Users have told others about it, until millions of boxes have been taken. That is one great reason why excess fat is far less common now.

Try the method which has helped so many. In each box of Marmola you will find the formula, also the scientific reasons for all good results. Go now and learn how much new beauty, youth and vigor it can bring to you.

Marmola prescription tablets are sold by all druggists at $1 a box. Any druggist who is out will gladly order for you.

MARMOLA
PRESCRIPTION TABLETS
The Right Way to Reduce

480 *Exhibit 1–j*

(See p. 413, supra)

Modern science has found that excess fat is largely due to an under-active gland. Starve as you will, exercise as you will, you are bound to fail unless you correct the cause.

That gland largely controls nutrition. When it is weak, too much food goes to fat, too little to fuel and energy. So modern physicians, in treating obesity, supply the gland substance which is scant.

That is the method employed in Marmola prescription tablets, prepared by a famous medical laboratory. People have used them for 22 years—millions of boxes of them. Anybody, in any circle, can see what a change has come. Excess fat is disappearing fast. New youth and beauty, new health and vitality, are conspicuous everywhere.

If you are abnormal in your weight, a certain gland is abnormal. Try Marmola. Feed the factor lacking. Watch the pounds go, the new vitality return. You will be amazed and delighted. But the formula in each box of Marmola will tell you the reason. To people who know, there is no excuse today for obesity. Start to remedy that ill condition now.

Marmola prescription tablets are sold by all druggists at $1 a box. Any druggist who is out will gladly order for you.

MARMOLA
PRESCRIPTION TABLETS
The Pleasant Way to Reduce

Exhibit 1–k

(See p. 413, supra)

No need to deny yourself all good things because you overweigh. Modern physicians do not advise starvation. They know the dangers of it. They know that people who are over-fat have generally an under-active gland. So they supply the factor, for lack of which too much food goes to fat.

This modern method is the basis of Marmola prescription tablets. These tablets were perfected, and are prepared, by a famous medical laboratory. A book in each box states the formula and explains the reasons for results.

For 22 years Marmola has held the top place in its field. Millions of boxes have been used in fighting fat. The people who gained new youth and beauty, new health and vigor, have told others. Now the results are seen everywhere. Excess fat has largely disappeared.

There is usually no excuse for an abnormal figure and the dangers which go with it. If the cause is an under-active gland, Marmola is the right way to combat it. For 22 years, countless people have been learning what it does.

Go try Marmola and learn what they have learned. Read the book in the box, then do as directed. Take four tablets a day. When you see that results are coming, go on and complete them. You owe that to your future. Start today.

Marmola prescription tablets are sold by all druggists at $1 a box. Any druggist who is out will gladly order for you.

MARMOLA
PRESCRIPTION TABLETS
The Right Way to Reduce

481 *Exhibit 1-l*

(See p. 418, supra)

Why Fat
WHEN SO MANY FIND IT EASY TO REDUCE

All can see everywhere that countless people have found the right way to fight fat. Slender figures now prevail. Excess fat has largely disappeared. Mark the people you know who in late years have gained new youth and beauty, new health and vigor, by combating fat.

One great reason lies in the discovery that most fat people have an under-active gland. Its failure to control nutrition permits too much food to form fat. Modern physicians, in treating obesity, combat that cause.

Their method is the basis of Marmola prescription tablets. Each box contains the formula, also the reasons for the good results. People have used Marmola for 22 years—millions of boxes of it. And the results have come without abnormal exercise or diet.

Why retain your excess fat when so many have ended theirs? Go try their method—try it now. Get Marmola, read the book in the box. Take four tablets daily, as directed, and watch the changes that occur. Do this in justice to yourself, to please your family and friends. You will be delighted.

Marmola prescription tablets are sold by all druggists at $1 a box. Any druggist who is out will gladly order for you.

MARMOLA
PRESCRIPTION TABLETS
The Pleasant Way to Reduce

Exhibit 1-m

(See p. 418, supra)

TELL FOLKS
how easy it is to
LOSE FAT

Everybody knows how excess fat has disappeared in late years. Men and women in every circle prove that figures need not stay abnormal. Youth and beauty, health and vitality can come back.

All must realize that, in late years, some new factor is employed. Fewer people now rely on abnormal exercise or diet. Modern science has proved that most fat people suffer from an under-active gland. Physicians now, in treating obesity, seek to correct that deficiency.

The chief factors are embodied in Marmola prescription tablets, prepared by a famous laboratory. People have used them for 22 years—millions of boxes of them. Now in every circle there are slender people who can tell you what they do.

The method is scientific and well known. Every box of Marmola contains the formula, also the reasons for the good results. No starvation, though moderation helps. The purpose is to help out an under-active gland, which should turn food into fuel and energy.

Go test this well-tried method. In a little while results will tell you what Marmola means to you. If you see the excess fat go and new vitality return, go on until the change is completed. Then, in fairness to your friends, tell them, as users have done for so long. Start today.

Marmola prescription tablets are sold by all druggists at $1 a box. Any druggist who is out will gladly order for you.

MARMOLA
PRESCRIPTION TABLETS
The Right Way to Reduce

Exhibit 1 n

(See p. 413, supra.)

FEW ARE FAT IN THESE DAYS

THERE'S A REASON

Have you noted how few people are now over-fat, as compared with years ago? Slender figures are the vogue. And they have brought to millions new youth and beauty, new health and vigor.

Look about you in any crowd, and you will realize that some new factor has been found. People are not starving to reduce. They are combating the cause of obesity, which usually lies in an under-active gland. Modern science has discovered the remedy, and physicians the world over now employ it.

A famous medical laboratory embodies the method in Marmola prescription tablets. People have used them for 22 years—millions of boxes of them. They have told the results to others. So countless people now reduce in this right and easy way.

The Marmola prescription is not secret. A book in each box states the formula, and explains the results. Your own doctor would probably prescribe the same help if you asked him.

No abnormal exercise or diet. Simply take four tablets of Marmola daily until your loss of fat proves that the cause is corrected.

Try Marmola, if you need it. Do this in fairness to yourself, your family and friends. Correct this wrong condition and note the amazing results. Life will bring you many new joys when you cease to overweigh. Start today.

Marmola prescription tablets are sold by all druggists at $1 a box. Any druggist who is out will gladly order for you.

MARMOLA

PRESCRIPTION TABLETS

The Pleasant Way to Reduce

Exhibit 1–o

(See p. 413, supra)

WHAT DID MADGE DO WITH HER FAT? JUST THIS:

ALL over the country, men and women are wondering at the slender figures of today. Excess fat is rare now, compared with years ago.

These people do not starve themselves of elements they need. They employ a modern, scientific method to combat the cause of fat. The cause usually lies in an under-active gland, which largely controls nutrition.

Modern physicians, in treating obesity, do not advise starvation. They feed the gland substance which is lacking. Thus the whole world has changed, in late years, as regards the over-fat.

A famous medical laboratory embodied the method in Marmola prescription tablets. People have used them for 22 years —millions of boxes of them. They have told others about them and shown the results, in new youth and beauty, new health and vitality. Today the use of Marmola is unprecedented.

Every box of Marmola contains the formula, also the scientific reasons for results. When fat disappears, and new health and vigor come, you know why.

Try Marmola, and watch the results for a little while. If you see the fat go and new vigor come, keep on until the trouble is corrected. Then tell your friends who need it. It is folly to suffer an abnormal condition so easily corrected. Go get Marmola now.

Marmola prescription tablets are sold by all druggists at $1 a box. Any druggist who is out will gladly order for you.

MARMOLA

PRESCRIPTION TABLETS

The Right Way to Reduce

Exhibit 1 p

(See p. 413, supra)

THE FOLLY OF FAT

PROVED FOR 22 YEARS—AND TO MANY

CONSIDER the fact that countless people, for many years, have been fighting fat in the modern way. No abnormal exercise or diet to bring harm.

Note the results you see everywhere. Slender figures now prevail. Excess fat is the exception. New youth and beauty, new health and vigor, have come to multitudes in the easy, pleasant, right way.

One great reason is a discovery that science made some years ago. It was found that most fat people had an underactive gland. That gland largely controls nutrition, and its weakness leads to fat.

Modern physicians, since that discovery, have applied a new treatment to obesity. They have fed the lacking substance.

Marmola prescription tablets, prepared by a famous laboratory, contain the factors they employ. So this effective and right method is at everyone's command.

Marmola has been used for 22 years—millions of boxes of it. Users have told others the results until Marmola now stands alone. A book in each box gives the formula and explains the reasons for results. So users know what they are taking and why the good effects appear.

Is it not folly to stay fat when so many have found an easy way to slender, normal figures? And the right way. Go try the method they employed. Watch the results from a box or two of Marmola, then decide for yourself what it means. A right condition means much to you. Go start today.

Marmola prescription tablets are sold by all druggists at $1 a box. Any druggist who is out will gladly order for you.

MARMOLA

PRESCRIPTION TABLETS

The Pleasant Way to Reduce

Exhibit 1–5

(See p. 413, supra)

FOOD FOR THE FAT

TWO GRAINS OF GLAND FOOD DAILY THEN THE FOODS YOU LOVE

FAT people, of course, should not over-eat. They rarely do. But starvation is a very risky way to reduce.

Modern science finds that a common cause of excess fat lies in an under-active gland. That gland largely controls nutrition. People grow fat when its secretions are scanty, despite all exercise and diet.

So physicians everywhere, in treating obesity, now feed a certain gland food. They combat the cause. The results are amazing, and they come in the right way.

A famous medical laboratory embodies that method in Marmola prescription tablets. People have used them for 22 years —millions of boxes of them. All can see the results on every hand. Excess fat is far less common than twenty years ago.

The Marmola prescription is not secret. The formula is stated in every box. All the good results are explained. So users know why the flesh reduction brings such extra health and vigor.

No abnormal exercise or diet. Simply take four tablets daily until you reach the weight desired. Then you will know that the cause is corrected. An abnormal condition has been changed.

Try Marmola. It has served so many for so long that you owe this to yourself. Watch the new youth and beauty as it comes, the new health and vigor. Then tell your friends. Go start today.

Marmola prescription tablets are sold by all druggists at $1 a box. Any druggist who is out will gladly order for you.

MARMOLA

PRESCRIPTION TABLETS

The Pleasant Way to Reduce

Exhibit 1 r

(See p. 413, supra)

DANGERS IN DIETS

TO END FAT

A BETTER WAY

MANY more people would fight fat in the right way if they did not fear some harm. The slender figures, multiplied in late years, could be multiplied again.

But the danger lies in starvation or abnormal exercise. The right way is to combat the cause. It usually lies in an under-active gland. That scanty gland secretion lets too much food go to fat. Modern physicians, in treating obesity, feed the lacking substance.

That method is the basis of Marmola prescription tablets. They are prepared by a famous laboratory, to offer this right method at its best. People have used them for 22 years—millions of boxes of them. The results are seen in every circle. Almost everyone has friends who can show and tell the many good effects.

The Marmola prescription is not secret. Each box contains the formula, and all the good results are explained. The user who gains new youth and beauty, new health and vigor, knows exactly why.

If you suffer from excess fat, combat the cause. It is a blight to beauty and to health. Don't starve, but feed the system a substance that is lacking. Marmola tablets do that.

Consider how many have employed this method, and for 22 years. It must be right. Go learn what they have learned. Watch the results from a box or two of Marmola, and let those results decide. Start now. Don't delay appearing at your best.

Marmola prescription tablets are sold by all druggists at $1 a box. Any druggist who is out will gladly order for you.

MARMOLA

PRESCRIPTION TABLETS

The Right Way to Reduce

487

Exhibit 2

(See pp. 420–425, supra)

OPENING ADDRESS OF HONORABLE W. E. HUMPHREY, CHAIRMAN OF THE FEDERAL TRADE COMMISSION, AT THE TRADE PRACTICE CONFERENCE OF THE PUBLISHERS OF PERIODICALS, WALDORF-ASTORIA HOTEL, NEW YORK CITY, OCTOBER 9, 1928

The representatives of approximately 6,000 publishers of periodicals constitute this trade-practice conference now entering upon its labors. A limited number of newspaper men and representatives of the advertising agencies and the Better Business Bureau have been invited to attend and participate in its deliberations. The subject of this conference is fraudulent advertising.

The Federal Trade Commission has heretofore held like conferences in various industries. These conferences have proven to be of immeasurable public benefit. This present conference, I hope and believe, will be the most important that has ever been held by the commission. This conference is unusual. It represents a larger number of private business enterprises than has been represented in any prior conference. The publishers of periodicals can make, modify, and direct the public opinion of the country in a far greater degree than the representatives of any other industry with
488 which we have held a conference. It is trite to say that the success of the labors of the Federal Trade Commission depends largely upon a sympathetic, interested, enlightened, and approving public opinion. I feel certain that we are going to have the earnest cooperation of practically every publisher in the country in our attempt to suppress fraudulent advertising. I have good reason for that belief. What stronger evidence could be produced that this is true than that upon the preliminary question of the advisability of calling this conference, not a letter was received opposing it, from over 6,000 publishers to whom the question was put. That is a remarkable fact. It demonstrates that your profession is in the hands of honest men and women who want to obey the law; men and women who do not want to be a party to any fraudulent or mercenary practice, who are anxious to protect the public interest; men and women who do not want to be a necessary party in defrauding and robbing the sick, the afflicted, the unfortunate, the credulous and the ignorant.

POWERS OF COMMISSION

The commission receives its powers as to the suppression of unfair methods of competition from section 5 of the Federal Trade Commission act. That statute fixes what practices are lawful or unlawful. The commission has power to do neither. The authority of the commission is now just what Congress gave it and it will remain

exactly the same as it is until Congress changes it. A series of constructive and enlightening decisions by the courts, especially the Supreme Court of the United States, has made clear those powers under the statute, and the proper practice in proceedings by or before the commission.

The purpose of this conference is not in any degree to establish a censorship over the press. It is not intended to place any additional burden whatever upon the publisher. It is not intended to tell the publisher what he shall or shall not publish. The law as it is now written tells him that. It is not intended to enlarge the jurisdiction of the commission. The commission does
489 not desire in any way to increase its power. It could not do so even if such was its wish. The commission's sole desire is to stop practices that are now prohibited by law.

Any plan adopted by this conference will be an expression only of the judgment, conscience, and the purpose of those who adopt it. It can not make any practice lawful, and it can not make any practice unlawful. The rights of the publisher, the advertiser, and the public can not in any degree be changed by the action of this conference. The Federal Trade Commission will have no power, because of any rule or plan adopted by the conference, to prohibit any practice not now prohibited by law.

Nothing could be further from the truth than that the calling of this conference is to be taken as an indication that the commission believes that the publishers of periodicals are generally dishonest. The majority of such publishers not only obey the law but often go far beyond what the law requires in selecting the advertisements they will publish. An invitation to this conference does not mean that the one receiving it is even remotely suspected of unfair practices—rather to the contrary. For it is to the honest in any industry, to those who themselves obey the law, that we must look for help to make and keep clean that industry. We must depend upon the honest and wise men to control and suppress the dishonest in an industry, the same as in government. With the assistance of the honest publisher, false advertising can be practically eliminated. With the few dishonest and crooked who will not follow the judgment and wish of the majority, the commission will have to deal by proper action.

As in all other industries, you have within your ranks those who violate the law. And an invitation to this conference means that we expect the help of the honest majority to clean the industry and to use their influence to assist us in controlling and suppressing the dishonest, not only in the public interest but in the interest of the industry that they shame and discredit.

490 EXTENT OF FRAUDULENT ADVERTISING

The people are annually robbed of millions of dollars by false and misleading advertisements that appear in the periodicals of the

country. Some are latently false, some are near the border line and in the twilight zone. Of these I do not now especially speak, but of those that are openly and shamelessly false on their face, those about which no reasonably intelligent man could be mistaken. This class of advertisement takes its toll of millions annually from the sick, the unfortunate and the ignorant; those that are ready to try anything as a forlorn hope.

How can this gigantic evil of false advertising be suppressed? The Department of Justice, the Post Office Department, and the Federal Trade Commission have waged war unceasingly against it. But the result has been most unsatisfactory and discouraging. What of the responsibility of the publisher? He becomes part of the plan. Without his assistance the consummation of the scheme would be impossible. Knowingly or unknowingly the publisher helps rob the unfortunate victim. He brings the victim and the crook together. He shares in the ill-gotten gains. In publishing such advertisement the publisher is violating the law. He is guilty of an unfair practice. In a suit by the Federal Trade Commission to suppress such advertising the publisher is not only a proper party, but under recent decisions he is a necessary party. The commission, as a public duty that it is under every obligation to perform, should make the publisher a party to all suits against fraudulent advertising by publication. These facts in regard to their responsibility seem not to be generally understood by the publishers. This is the outstanding reason why the commission has called this conference.

COOPERATION OF PUBLISHERS DESIRED

We come asking the publisher to take up this question and
491 do what he can voluntarily to eliminate this great evil. And certainly it would be of tremendous advantage to the publishing industry to voluntarily abandon any unlawful practice rather than to be forced to do so through the courts. More protection can be given to the public by your cooperation than by years of litigation. Without your assistance, it is an endless and almost hopeless task.

I think you can now understand the reasons why the commission felt that it was performing the highest public duty when it asked the publishers of the country for their co-operation; when it asked the publishers of the country to voluntarily clean their own house instead of the commission bringing numberless suits to compel such action. I think that all honest men will agree that the commission in calling this conference acted not only in the interest of the public but in the interest of the publisher also. We want to protect the public, but we do not want to injure any publisher, and we do not desire to involve any business in litigation if it can be avoided.

There is another appealing reason for the publisher to do what he can to protect his readers, that should arouse his sense of justice and his duty to the public. When an unfair practice appears in most any other business, it hurts some competitor. That competitor is usually quick to complain and bring the fact to the attention of the

commission, and thereby he protects the public while protecting himself. But in the case of many of these false and misleading advertisements there is no competitor. The victim is in reality helpless. He is either too ignorant or too ashamed of the publicity it will bring to make any complaint. Usually the amount is too small to justify the trouble and expense of securing redress. These are the main reasons why the faker and the crook of this class are able to successfully carry on their work. So the publisher in eliminating fraudulent advertising is protecting those who are unable to protect themselves, giving protection to those who most need it—the weak and the helpless.

492 PUBLISHER'S RESPONSIBILITY

It has been argued that it is a serious thing for the Federal Trade Commission to make the publisher responsible for the truth of his advertisements. Let me be clearly understood upon that point. The commission seeks to do nothing of the kind. The law makes the publisher responsible for any false and misleading advertisements that he publishes. The publisher, just as every other man, must take the responsibility of conducting his business according to law. Many publishers in this country keep a statement standing in their columns that they assume the responsibility for the honesty of their advertisers. Many publishers attempt to justify themselves for the publication of a certain class of advertisements because they receive no complaint from their readers that such advertisements are fraudulent. But this is an excuse and not a reason, and is no justification whatever, for, as already pointed out, in a great number of cases of frudulent advertising, and those of the lowest and vilest kind, the victims seldom complain.

Rightly or wrongly, the public assumes that the publisher has knowledge of the advertiser whom he commends to public confidence and patronage. On that assumption the public pays its money and commits to advertisers often things more vital than money. To exercise such power over one's fellows is an extraordinary privilege. It carries with it extraordinary duties and responsibilities. The publisher should be what the public believes him to be. This is the inevitable measure of his moral responsibility to the public. The public faith in the publisher which he sells to advertisers he should vindicate and justify to his patrons.

THE SPECIFIC ACTION DESIRED

It is confidently expected that the conference will approve nothing that is unlawful. If so, of course such action would not
493 receive our approval. If the conference should see fit to adopt certain rules of ethics, or economy, not required by the law, but that the conference believes will be to the best interest of those represented, the commission will be glad to give its encourag-

ing approval to them, but of course could not enforce their observance.

The presumption is always that no man knowingly violates the law. Therefore it is presumed that no publisher knowingly publishes false and misleading advertisements, which act is a violation of law. Therefore it is perfectly plain, without putting it in words, that the purpose of this conference is not to get the publisher to agree not to knowingly publish false and misleading advertisements.

What, then, is the specific purpose of this conference? It is to have the publishers agree as to what they will do to find out whether or not an offered advertisement is false and misleading before it is published. That is exactly what we are here for. What plans and methods, what precautions will you take to ascertain the truth about an advertisement before putting it before your readers and publishing it to the world? That is the proposition. Of your combined wisdom and experience should be born plans and ways that will greatly help to bring about the consummation devoutly desired.

Will you ascertain the financial liability of the advertiser? Will you inquire into his reputation and standing? Will you accept in certain cases testimonials of supposed patrons of such advertisers as conclusive? All these precautions are helpful, perhaps necessary, but added together they are not always sufficient to show that you had acted with reasonable prudence, particularly with reference to that class of advertisement which makes claims that are contrary to the ordinary experience of mankind. Your own experience and knowledge in regard to the truth of the promise held out by such advertisement is more to be relied upon than any so-called evidence the advertiser may produce. There is little excuse for a publisher being deceived by the crook and faker that present advertise-
494 ments of this kind. The true test is to exercise such care as a reasonably prudent man under such circumstances would exercise if his own interest were directly and vitally affected. No exact rule nearer than that can be stated. In other words, the precautions you would take to protect yourself, measure the duty that you owe to the public and to those who patronize your advertisers. Let me emphasize the fact that all I have said applies equally to the advertisements you are now publishing as well as to those you will hereafter publish.

Whether or not any advertisement you accept is in fact fraudulent and misleading, is a matter for the Commission to decide. But in an action brought against the publisher and the advertiser charging them with false and misleading advertising, the publisher who shows that he used reasonable care to ascertain the truth will find the discretion of the commission exercised in his favor when it comes to taking final action in the matter.

In other words, while the law may require that the publisher shall be made a party to such action, the commission in its discretion will see that the honest publisher receives the consideration to which he is entitled.

To summarize:

We can not and do not desire to increase our jurisdiction.

We can not and do not desire to increase the responsibility of the publisher.

We can not and do not desire to make anything now lawful, unlawful.

We only desire to prevent the publication of an advertisement, the publication of which is now prohibited by law.

In a word, we desire the publishers of the country to obey the law. Simply that—and nothing more.

In this undertaking, in the interest of the publishers themselves, in the interest of the unfortunate victims who are defrauded and misled, in the interest of the public, we confidently appeal to the publishers of 6,000 periodicals for cooperation and assistance.

495 I have faith that this cooperation will be given honestly and without mental reservation. You have justified that faith by your action in the preliminary steps we have taken.

I do not believe that there is an industry in America conducted by more honest, high-minded, public-spirited men and women than the publishing industry.

I do not believe that any industry in America has greater power for good and greater influence in shaping public opinion than the publishing industry.

I believe that the future greatness and security of the Nation rests to a greater extent upon the publishing industry than probably any other.

Believing in the greatness of its power and influence as I do and upon its sincere co-operation, I have a firm conviction that this conference will put more crooks and dishonest concerns out of business; prevent more frauds and swindles; give greater protection to the ignorant and unwary; prevent more misleading and unfair practices, and do more to promote honesty and fair dealing than any one thing that has ever been done under the direction of a governmental agency.

Exhibit 3

(See p. 427, supra)

FEDERAL TRADE COMMISSION,
Washington, D. C., May 16, 1929.

1–5407

NOTICE OF HEARING

To KLING-GIBSON COMPANY,
Strauss Building, Chicago, Illinois.

496 An application for the issuance of a complaint against you has been filed with the commission charging the use of unfair methods of competition in commerce in violation of section 5

of an act of Congress entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914, in that you are procuring the publication and circulation through various newspapers, magazines, and periodicals of certain false and misleading advertisements of certain articles being offered for sale and sold in interstate commerce, to wit, the advertisement of the Baladam Company of its product Marmola, against which company an order to cease and desist from the false advertising of such product was issued by the commission; and the advertisement of the Stuart Company of its product Stuart's calcium wafers, against which company the commission has recently ordered complaint to issue, which advertisements are alleged to be false and misleading and which said advertisements appear in certain newspapers, magazines, and periodicals, of general circulation, among which are the following:

Marmola—

Motion Picture, April, 1929.
Dream World Magazine, April, 1929.
Smart Set, Feb., Mar., Apr., 1929.
Screen Book, April, 1929.
Film Fun, April, 1929.
True Detective Mysteries, April, 1929.
True Romances, March, 1929

Stuart Company—

Smart Set, April, 1929.
Smart, Set, February, 1929.
Dream World, April, 1929.

You are hereby notified that an informal hearing will be held herein in room 2702, Federal Trade Commission Building, 20th and B Streets NW., Washington, D. C., on the seventh day of June, 1929, at ten a. m., at which time and place you may appear in person or by attorney or submit a statement to show cause, if any there be, why complaint should not issue, or why you should not be made respondent in any or all complaints issued or to be issued by the Federal Trade Commission against the advertiser above named. The hearing will be informal and will not involve the taking of testimony. Please notify the undersigned promptly if it is your intention to be present either in person or by representative.

By direction of the commission.

OTIS B. JOHNSON, *Secretary*.

(Signed) OTIS B. JOHNSON.

ELC:hbh.

Exhibit 4

(See p. 443, supra)

[Letterhead of Cleveland Plain Dealer, Cleveland, Ohio]

APRIL 23, 1929.

KLING-GIBSON COMPANY,
Chicago, Ill.

GENTLEMEN: We have received a letter from *the Cleveland Better Business Bureau, Inc.*, attached to which was copy of an order from the Federal Trade Commission issued April 13th, ordering the Raladam Company, makers of Marmola, to cease and desist all those practices in its advertising which were found to be contrary to law. We knew that the advertising of certain statements by the Raladam Company were questioned by the Federal Trade Commission and *have been asked for some time by the Cleveland Better Business Bureau not to accept the copy. However, no definite decision had been made by the Federal Trade Commission and we continued to run the advertising. We of course do not want to continue any practices that might subject us to severe criticism by the Government*, and ask that you let us have a very early reply as to just what this is all about.

Very truly yours,

CLEVELAND PLAIN DEALER,
H. W. HICKS,
National Advertising Dept.

(Our italics.)

498

Exhibit 5

(See p. 443, supra)

[Letterhead of the Milwaukee Journal, Milwaukee, Wisconsin]

MILWAUKEE, *May 7, 1929.*

O'MARA & ORMSBY, INC.,
Chicago, Ill.

DEAR SIRS: Raladam Co., Marmola. *The Better Business Bureau of Milwaukee* send us a report to the effect that the Federal Trade Commission has issued a cease and desist order against the manufacturers of Marmola. Among other things, we understand the order directs that the Raladam Company shall not offer Marmola as a remedy for obesity unless such representation is accompanied by a statement that it cannot be taken with safety except under the direction of competent medical authority. Please give consideration to this immediately and let us have a complete report of your interview with the agency prior to Saturday of this week, the closing date for the next Marmola advertisement in our rotogravure section. *If the facts*

are as stated by the Milwaukee Association of Commerce, we must decline further service to the account.

Very truly yours,

THE MILWAUKEE JOURNAL,
E. G. HOBBY,
Manager, Advertising Department.

(Our italics.)

Exhibit 6

(See p. 443, supra)

[Letterhead of Picture Play, Street & Smith Corp., publishers, Chicago, Illinois]

CHICAGO, *May eighth, nineteen twenty-nine.*

KLING-GIBSON COMPANY,
Straus Building, Chicago, Ill.

GENTLEMEN: I regret very much the necessity of returning the enclosed order for Raladam Company to run in August, 1929, *Picture Play.* This order is being returned *because of the National Better Business Bureau, Inc., ruling.*

Yours very truly,

STREET & SMITH CORP.,
FRANK C. ATKINSON,
Western Manager.

(Our italics.)

Exhibit 7

(See p. 445, supra)

[Letterhead of the Daily Oklahoman and Oklahoma City Times, Oklahoma City, Oklahoma]

OKLAHOMA CITY, OKLA., *May 20, 1929.*

KLING-GIBSON COMPANY,
310 North Michigan Ave., Chicago, Illinois.

GENTLEMEN: Re Marmola. Pursuant to the advice of our legal department, effective May 20, we will be unable to carry Marmola advertising until such time as the Federal Commission withdraws its disapproval of this class of advertising. *This action is taken because the commission holds the publisher as well as the advertiser is responsible for violation of its orders.* It is not our policy to pass upon the merits of products nor on the validity of their advertising claims—we are acting merely upon the advice of a governmental agency whose duty it is to make such tests and recommendations.

Very truly yours,

THE OKLAHOMAN AND TIMES,
J. I. METERSON,
Advertising Manager.

(Our italics.)

Exhibit 8

(See p. 445, supra)

[Letterhead of the Columbus Dispatch, Columbus, Ohio]

COLUMBUS, OHIO, *May 20, 1929.*

KLING-GIBSON COMPANY,
Straus Building, Chicago, Ill.

500 GENTLEMEN: In view of the cease and desist ruling recently issued by the Federal Trade Commission against your client, the Raladam Company, and the subsequent action of the company against the commission to prevent their handing down this ruling, we do not wish to publish further Marmola copy until the case is settled. Your selection of the Dispatch for this advertising is very much appreciated, and we are sorry that this action is necessary.

Very truly yours,

THE COLUMBUS DISPATCH.
R. R. SCHENK,
National Advertising Manager.

Exhibit 9

(See p. 445, supra)

[Letterhead of the Ohio State Journal, Columbus, Ohio]

COLUMBUS, OHIO, *May 23rd, 1929.*

Miss C. E. BONNESON,
Kling-Gibson Co.,
Willoughby Tower, Chicago, Illinois.

DEAR MISS BONNESON: Re Marmola. As you are aware, the *Better Business Bureau* has been questioning some copy that we have been running, *at the suggestion of the Federal Trade Commission.* Among the copy that is being questioned is that of your client named above. We have advised the *Better Business Bureau* that if your copy has been changed to conform to the order of the Federal Trade Commission that we will continue to carry it. My publisher has asked me to notify you of this fact, and also to advise that we must decline the copy if it is not in accord with those requirements. Would appreciate your writing me concerning this in order that there will be no hold-up in the schedule if the copy is in conformity with the rulings. Attached hereto is a letter that we have to-day written to the *Columbus Better Bureau* on the subject.

Very truly yours,

DICK JEMISON,
National Advertising Mgnager.

(Our italics.)

501 *Exhibit 10*

(See p. 445, supra)

[Letterhead of Kellogg M. Patterson, special representative of the Cincinnati Times-Star]

CHICAGO, ILLINOIS, *May 29, 1929.*

KLING-GIBSON ADVERTISING AGENCY,
Willoughby Tower, Chicago, Illinois.

Gentlemen: The Cincinnati Times-Star has just advised us that because of the repeated protests of the *Cincinnati Better Business Bureau* they have decided to eliminate the Marmola advertising after the insertion of May 28th. The bureau calls the attention of the Times-Star to a *recent cease and desist order of the Federal Trade Commission* and advised the Times-Star that the Enquirer immediately, on the issuance of this order, had suspended the advertising. *In view of the order of the commission, the Times-Star feels that it has no alternative but to suspend the advertising.*

Yours very truly,

JAS. A. MCLAUGHLIN.

(Our italics.)

Exhibit 11

(See pp. 445, 446, supra)

[Letterhead of the Portland News, Portland, Oregon]

PORTLAND, OREGON, *June 4, 1929.*

MR. L. M. WILLIAMS,
Kling-Gibson Company,
310 S. Michigan Avenue, Chicago, Ill.

DEAR MR. WILLIAMS: We greatly appreciate your letter of May 28th in regard to Marmola and assure you of every consideration. The copy of our letter to the Better Business Bureau inclosed will serve to advise you of our desire to be fair. *For some time we*
502 *have been besieged by the Better Business Bureau to eliminate Marmola advertising.* A great many of their requests were ignored or refused. However, when it was represented that other newspapers were complying with the bureau's request we finally agreed to suspend Marmola pending further information. It seems to us at this time that the best manner in which to alleviate this difficulty is by the presentation of your case to the *National Better Business Bureau* in such a manner that your copy will be approved by them. Even if we take an arbitrary stand against the bureau and insist upon the publication of your copy it will not stop the bureau's battle against you or their influence with other newspapers. In the meantime we have turned your letter of May 28th over to

Robert Mount, manager of the Portland bureau, along with our letter, of which we enclose a copy.

Yours very truly,

THE PORTLAND NEWS.
C. W. MYERS,
Business Manager.

(Our italics.)

Exhibit 18

(See p. 446, supra)

[Letterhead of Verree & Conklin, Inc., newspaper representatives]

CHICAGO, *June 4, 1929.*

Miss C. E. BONNESON,
Kling-Gibson Company,
Willoughby Tower, Chicago, Illinois.

DEAR MISS BONNESON: It is not necessary for me to tell you that wherever possible I have worked with you along constructive lines. Because of that desire I am returning enclosed contract covering Raladam advertising for the Evening Bulletin of Philadelphia and doing so because a contract is at present in force which does not expire until July 8th. The Bulletin does not accept contracts several weeks in advance; this is a ruling of the newspaper. However, another cause actuates me in so handling. The Bulletin is for the present at least, continuing the Raladam advertising;
503 but it is possible a new contract if sent along might in some way bring an earlier decision to no longer handle. *The Better Business Bureau* (according to information which has reached us from several newspapers, including the Portland Oregonian and the Utica Press) *is exceedingly busy and telling publishers that the United States Government will take action against newspapers carrying the copy, or to that effect.* It is my personal belief that when the United States Government wishes to make a ruling it will do its own telling, and I feel that the longer we can pull together to have copy continued so much the better. Trusting the above will explain my action in turning back at the present time the attached contract and which was previously offered the paper last April, believe me,

Sincerely yours,

VERREE & CONKLIN, INC.
ELIZABETH DONAHUE.

(Our italics.)

Exhibit 13

(See p. 451, supra)

[Letterhead of Kelly-Smith Company, newspaper representatives]

CHICAGO, *June 11, 1929.*

Miss C. E. BONNESON,
Kling-Gibson Company,
Chicago, Ills.

DEAR MISS BONNESON: Re Marmola—Youngstown (Ohio) Vindicator. I received a letter from the Youngstown Vindicator stating that they have been notified by the *National Better Business Bureau* and also the A. N. P. A. to the effect that under date of May 9 Chairman Humphrey of the Federal Trade Commission stated he would file an application for complaint against all publications that publish Marmola advertising unless they expressed their intention to discontinue such publication at once. Consequently the Vindicator feels it will be impossible for them to carry any further Marmola advertising.

Very truly yours,

KELLY-SMITH COMPANY.
J. E. WOODMAN.

(Our italics.)

504

Exhibit 14

(See p. 451, supra)

[Letterhead of Kling-Gibson Company]

CHICAGO, *July 9, 1929.*

RALADAM CO.,
2-235 General Motors Bldg., Detroit, Mich.

GENTLEMEN: We are in receipt of the following letter dated June 28th, 1929, from the Peoples Home Journal: "We are in receipt of your order covering 100 lines in our September, 1929, issue on the Marmola account and regret exceedingly that *due to an understanding with the National Business Bureau* we have agreed, with the September number, to discontinue the advertising of this account in our magazine. You can well appreciate our position in the matter, and we regret exceedingly that we must return to you your order and proof. Won't you please be so kind as to explain our position to your advertisers? Regretting that we can not cooperate with you at this time and hoping that at some future time we may be able to cooperate with you on some of your other accounts, we are,

"Very truly yours,

"W. ROY BARNHILL, *President.*"

Cordially yours,

L. COX.
KLING-GIBSON COMPANY.

(Our italics.)

Exhibit 15

(See p. 451, supra)

[Letterhead of the Press Telegram, Long Beach, California]

LONG BEACH, CALIFORNIA, *July 30, 1929.*

WILLIAMS, LAWRENCE & CRESMER,
360 N. Michigan Avenue, Chicago, Ill.

GENTLEMEN: We are holding up Marmola advertising at the insistence of the *Better Business Bureau.* We have been advised that the Federal Trade Commission have issued an order restrain-
505 ing the advertising of this product and *either the Federal Trade Commission or the National Better Business Bureau (we are not sure which) will bring into court any newspaper carrying copy in its present form.* The Press-Telegram has always supported the activities of the Better Business Bureau, but we carried the copy until the decision was handed down against the Marmola people.

Very truly yours,

THE PRESS-TELEGRAM PUBLISHING CO.
M. W. HEATON, *National Advertising Manager.*

(Our italics.)

Exhibit 16

(See p. 456, supra)

[Letterhead of the Aurora Beacon-News, Aurora, Illinois]

AURORA, ILL., *October 9, 1929.*

KLING-GIBSON CO.,
Willoughby Tower, 8 S. Michigan Avenue, Chicago, Ill.
(Attention: Mr. L. M. Williams.)

DEAR SIR: Yours of September 25 and October 8, together with the letter of July 11 from Stevenson, Butzel, Eaman & Long, was laid before the management for decision and the matter was discussed at some length. However, the decision was we would have to have something more definite and authoritative than the personal opinion of what liability the paper might incur. *It was felt that in carrying Marmola we would put ourselves in jeopardy much as we would if we carried an advertisement of lottery.* The lottery law just at present does not seem to be receiving much attention by the authorities, and yet no one knows when somebody will make a move to see that the paper obeyed the law and cause a fine at least, if not a removal from the second-class mail privilege. The fact that there does not seem to have been any real action taken in regard to the fulfilling of *Mr. Humphrey's threat* is no sign that he will not take action some

time. Even though your attorney's opinion is absolutely correct, we would still have to defend ourselves at considerable incon-
506 venience and expense, which danger, of course, you can readily see we do not want to incur. If your suit is decided in favor of Marmola and against the Federal Trade Commission, we will be mightly glad to carry the advertising, unless in the meantime we are more convinced than we are at present that Marmola is a harmful drug.

Yours truly,

AURORA BEACON PUBLISHING CO.,
J. K. GROOM,
Director of National Advertising.

(Our italics.)

Exhibit 17

(See p. 456, supra)

[Letterhead of the Aurora Beacon-News, Aurora, Illinois]

AURORA, ILL., *October 26, 1929.*

SALADAM COMPANY,
2-235 General Motors Bldg., Detroit, Mich.

GENTLEMEN: Re yours of October 23. Under instructions we are not running Marmola advertising at this time, or you would have been receiving the checking copies in the shape of tear sheets under first-class postage regularly. We had quite a little bit of correspondence with Kling-Gibson Company about this matter, and *the management decided until there was a judicial decision on the matter that we would have to decline to run the copy.* The writer is sorry that this condition exists, but the judgment of the management was that while the opinions of your attorneys and others, even to a member of the Federal Trade Commission, seemed to indicate that we might run this safely until such decision was made, nevertheless, opinions are not decisions, and *we do not want to place ourselves in a position that if you lose your case in court we could be yanked up and at least made to defend ourselves. I fancy that the annoyance and expense of defending ourselves would be fully as bad as any fine the commission might levy on us.*

Yours truly,

AURORA BEACON PUBLISHING CO.,
J. K. GROOM,
Director of National Advertising.

(Our italics.)

507 *Exhibit 18*

(See p. 456, supra)

[Letterhead of the Muncie Star, Muncie, Indiana]

MUNCIE, INDIANA, *October 26th, 1929.*

RALADAM COMPANY,
235 General Motors Bldg., Detroit, Michigan.

GENTLEMEN: We have your letter of the 23rd asking that we send you checking copies of your advertising. Until such time as your legal difficulties are finally settled we will not be able to insert your advertising.

Yours very truly,

HARRY F. GUTHRIE, *Manager.*

Exhibit 19

(See p. 456, supra)

[Letterhead of Milwaukee Herold, Milwaukee, Wisconsin]

MILWAUKEE, WIS., *October 29th, 1929.*

RALADAM COMPANY,
General Motors Bldg., Detroit, Mich.

GENTLEMEN: In reply to your letter of October 25 in regard to checking copies we have advised the Kling-Gibson Company, your Chicago agency, that we *temporarily suspended the advertising of Marmola on account of the litigation now pending in Washington. As soon as this matter is clarified we will again be in a position to entertain your advertising space.* While there are several opinions on the situation, there is also the *prevailing one that the publisher may be involved*, and you can readily understand where we could not be placed in this position. Sincerely hoping that you will bear with us until the decision is made, we are,

Very truly yours,

THE MILWAUKEE HEROLD,
L. C. BURTMAN, *Advertising Manager.*

[Our italics.]

508 In United States Circuit Court of Appeals for the Sixth Circuit

[Title omitted.]

Notice of motion to strike out

Filed January 6, 1930

Messrs. STEVENSON, BUTZEL, EAMAN & LONG,
First National Bank Building, Detroit, Michigan.

GENTLEMEN: Please take notice that at the time of the final hearing of this cause on the merits I shall submit the attached motion to

strike out portions of petitioner's answer to paragraphs G and H of respondent's answer in the nature of cross bill.

ROBT. E. HEALY,
Chief Counsel, Federal Trade Commission.
MARTIN A. MORRISON,
Assistant Chief Counsel.
EDWARD J. HORNIBROOK,
Attorney.

Due service of the above notice, and attached motion, and receipt of copies thereof, admitted this day of January, 1930.

STEVENSON, BUTZEL, EAMAN & LONG,
Attorneys for Petitioner.

509 In United States Circuit Court of Appeals for the Sixth Circuit

[Title omitted.]

Motion to strike out portions of petitioner's answer to paragraphs G and H of respondent's answer in nature of cross bill

Respondent, Federal Trade Commission, moves the court to strike from the certain pleading filed by petitioner herein, and denominated "The answer of the petitioner to paragraphs G and H of respondent's 'Answer in the nature of cross bill,'" paragraphs III, IV, V, VI, VII, VIII, IX, X, XI, and XII thereof, and each of them separately and severally, for the reasons and upon the grounds separately and severally, to wit:

First. The filing of petitioner's petition to set aside the case-and-desist order involved herein, and petitioner's assertion that the same is invalid, imposed upon this court, regardless of anything the respondent might say or do, the duty to review said order and gave the court jurisdiction to affirm, set aside, or modify said order.

510 The filing of respondent's cross bill did not alter this situation, but merely put the respondent where it would be entitled to a decree of enforcement of the order if the same should be affirmed or modified and affirmed as modified. (Section 5, Federal Trade Commission act.)

It is at least permissible practice for the respondent to couple with its answer a cross petition asking such enforcement, "and thus to present the question with all formality." That such practice is proper, whether necessary or not, was determined by this court in the case of L. B. Silver Company v. Federal Trade Commission (292 Fed. 752, 753). The practice of filing cross petitions probably grows out of the decision of this court in the Silver case.

Second. Under section 5 of the Federal Trade Commission act the review by this court of the order sought to be set aside is to be based upon the pleadings, testimony, and proceedings set forth in the transcript filed in this case.

This practice is clearly provided for by statute, as recognized by the courts. (National Harness Mfrs. Ass'n v. Federal Trade Commission, 261 Fed. 171.)

The court, in the decision last referred to, referred to the provision of section 5 under which, upon a showing required in section 5, a party may ask that proper action be taken to bring into the record additional evidence. In this case no showing has been made, nor has any application been made. For this case therefore the practice stands as though there were no provision for the bringing in of additional evidence.

Paragraphs III, IV, V, VI, VII, VIII, IX, X, XI, and XII consist entirely of matter not in the record in this case, and
511 that can not in any way support petitioner's answer. They should, therefore, be stricken.

Third. Paragraphs I and II of petitioner's so-called answer to respondent's cross bill expressly admit all the allegations of paragraphs G and H of the cross bill, thereby establishing disobedience of the order to cease and desist and eliminating any question as to the necessity of proof on that point.

Fourth. No fact or facts alleged in the portions of said answer hereby asked to be stricken out affects or affect the regularity, propriety, or validity of the controverted order to cease and desist. No fact or facts so alleged tends or tend to show that the Federal Trade Commission or any member thereof has at any time said or done anything that was not properly in the line of duty or that justly subjects the commission or any member thereof to adverse criticism in a legal or ethical sense.

Fifth. The allegations therein contained are irrelevant and immaterial.

ARGUMENT

It is the common practice in cases brought to enforce or set aside the commission's orders for parties to file, and the courts to consider and rule upon, motions to strike pleadings, or parts thereof. Such rulings in the nature of things are not to be found in the printed reports.

First. That the jurisdiction, powers, and duties of the
512 court under petitioner's petition to set aside the commission's order are not enlarged by the filing of petitioner's cross bill is manifest from the language of section 5. The portion affecting this question is as follows:

"Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said Circuit Court of Appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record, as hereinbefore provided. Upon the filing of the transcript the court shall have

the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive."

That part of section 5 which fixes the jurisdiction and powers of this court upon a petition for the enforcement of the order is as follows:

"Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter, upon the pleadings, testimony, and proceedings set forth in such transcript, a decree affirming, modifying, or setting aside the order of the commission."

The statute is so clear as to need no construction. In National Harness Mfrs. Ass'n. v. Federal Trade Commission (261 Fed. 170, 171) the court used these words in speaking of a petition to set aside an order to cease and desist, to wit:

"The court then has the same duty of review as if the commission had brought the matter here."

In the case of L. B. Silver Comapny v. Federal Trade Commission (292 Fed. 752, 753, out of which the practice of filing cross bills probably grew, there is no suggestion that a cross bill enlarges the powers or jurisdiction of the court. It relates only to the matter of a decree for enforcement after an order has been affirmed and is intended only "thus to present the question with all formality."

513

Second. Upon respondent's second proposition the language of section 5 is likewise conclusive.

Third. The language of paragraphs I and II of petitioner's so-called answer to respondent's cross bill is conclusive upon the third ground alleged in respondent's motion to strike.

Fourth and Fifth. The allegations which respondent seeks to strike out are so clearly irrelevant, impertinent, and immaterial that respondent doubts the propriety of saying anything further about them.

Were they relevant, they would be without force, legal, or ethical. In the last analysis they only show:

1. The Federal Trade Commission invited the publishers of the country to hold a trade-practice conference to devise ways and means by which publishers might more effectively guard their columns against false and misleading advertising copy.

The conference was composed of representatives of thousands of publishers.

2. Commissioner Humphrey, of the Federal Trade Commission, presided. He asked the publishers to exercise greater care and suggested that better means be devised and employed for that purpose. The conference adopted a resolution pledging greater care and adopt-

ing the National Better Business Bureau, Inc., as the instrumentality of the conference for that purpose.

The Better Business Bureau thus became the agent of the
514 conference. It has not now, and never has had, any connection with the Federal Trade Commission. It is, as agent of the publishers, seeking by its private activities to accomplish the same kind of results that the commission seeks to accomplish by its official activities. The Better Business Bureau is responsible only to the Publishers' Conference, and only the Publishers' Conference is responsible for the Better Business Bureau.

3. Commissioner Humphrey declared that the commission may rightfully make a publisher a party defendant along with an advertiser against whom it issues a complaint charging the publication of advertising copy that is false and misleading under section 5. In his discussions of the prevalence of false and misleading advertising in magazines and other publications he referred to several classes of merchandise, including anti-fat remedies.

4. After the commission made and issued the controverted cease and desist order against petitioner, and it became generally known that petitioner was disobeying the order and intended so to continue, the only relation sustained by the commission to the case against the petitioner was that of a Federal instrumentality charged with the duty of procuring the enforcement of its order thus already made. No other power remained in the commission. That sole remaining power could be exercised only by filing in a Circuit Court of Appeals a petition for a decree of enforcement. Petitioner did not await such action, but filed the pending petition to set aside the commission's order.

After the petition in this case had been filed the commission was
515 without power to take affirmative action against a publisher or other person engaged in the service of petitioner. The commission could only await and abide the decision of this court. If this court shall affirm, or modify and affirm, such order, the court's decree will be binding not only on the parties but on all persons, including publishers.

Thereafter all persons having knowledge of the fact of such decree, and who thereafter disobey the same, may be proceeded against as for contempt. (22 Cyc. 1012e; McCourtney et al. v. United States, 291 Fed. 497, 500; In re Lennon, 166 U. S. 548, 554.)

Commissioner Humphrey, in response to inquiries, stated that in case of the affirmance of the commission's order active steps would be taken to enforce the same against all publishers. Except for the fact that the inquiry related to publishers, the answer might well have been "all persons." The answer was in effect two-fold:

(1) That the commission would take no action until this case has been finally disposed of by this court.

(2) That in case of affirmance of the commission's order the commission would take action to enforce the court's decree against

all publishers who persisted in carrying petitioner's advertisements. Bearing in mind that a decree of this court may not be disobeyed until it has been rendered, the statement of Mr. Humphrey was no more than that the commission will do its full duty in case its order shall be affirmed. Such a letter, written by one commissioner after the order was issued and pending this appeal can not affect the regularity or validity of the commission's procedure, findings, or order from which this appeal is being prosecuted.

518 In view of the flood of false and misleading advertisements that, as a matter of common knowledge, have in recent years been carried in various publications, the action of the commission and of Commissioner Humphrey is commendable.

ROBT. E. HEALY,
Chief Counsel, Federal Trade Commission.
MARTIN A. MORRISON,
Assistant Chief Counsel.
EDWARD J. HORNIBROOK,
Attorney.

517 In United States Circuit Court of Appeals, Sixth Circuit

[Title omitted.]

Motion by petitioner for an order that additions be made to the transcript of record by a supplementary return

Filed Feb. 12, 1930

The Raladam Company, the petitioner above named, by Stevenson, Butzel, Eaman & Long, its attorneys, now comes and respectfully shows to the court:

1. That the Federal Trade Commission, the respondent above named, on April 18, 1929, made certain written findings of alleged facts, which were adverse to the petitioner; that respondent on said date made an order to cease and desist, which also was adverse to the petitioner, and was and is grounded on the said findings; that respondent has heretofore filed in this court a petition for review, a printed copy of which is filed herewith, and that in said petition for review it is prayed, among other things, that the said
518 findings and the said order be set aside and held for nought; and that copies of said findings and said order, respectively, to which reference is hereby made, are attached to the petitioner's said petition for review, and appear also in the transcript of so much of the entire record in the proceedings before the respondent as has heretofore been certified to, and is now on file in, this court.

2. That it is averred, in substance, in paragraphs 13, 16, and 20 of petitioner's said petition for review, to which reference is hereby made, and is now here respectfully averred, that in order to arrive

at the findings set forth in paragraphs Five, Seven, and Eight of respondent's said written findings of alleged facts, respondent arbitrarily and capriciously rejected, and failed to give effect to, documentary evidence and oral testimony adduced at the hearings in the said proceedings before respondent.

3. That it is respectfully now here averred, further, that by reason of respondent's having arbitrarily and capriciously rejected and failed to give effect to evidence as aforesaid, the findings set forth in said paragraphs Five, Seven, and Eight of respondent's said written findings of alleged facts, are wholly arbitrary and capricious; that if this court should affirm, and should require petitioner to conform to and obey, respondent's said order to cease and desist, this court would thereby give effect to respondent's said wholly arbitrary and capricious findings set forth in said paragraphs Five, Seven, and Eight, upon which said findings said order is grounded as aforesaid; that by such action of this court, respondent would thereby be deprived of liberty and property without due process of law, in violation of Article V of the articles in addition to, and amend-
519 ment of, the Constitution of the United States; and that the findings set forth in said paragraphs Five, Seven, and Eight, being wholly arbitrary and capricious as aforesaid, are not, the premises considered, binding or conclusive upon this court, notwithstanding the provision in U. S. Code, Tit. 15, sec. 45, that "The findings of the commission (meaning the Federal Trade Commission) as to facts, if supported by testimony, shall be conclusive."

4. That it is material to the question and indispensable to a wholly informed disposition of the question, which in due course this court will be called upon, and will find it necessary, to decide, of whether or not the findings in said paragraphs Five, Seven, and Eight of respondent's said written findings of alleged facts are, or are not, wholly arbitrary and capricious, as aforesaid; that this court should have before it for examination, as part of the record in this cause, the trial-examiner's report upon the facts, which, as is averred in paragraphs 8 and 9 of petitioner's petition for review herein, was made to, and filed with, respondent by respondent's trial examiner, the honorable Edward M. Averill.

5. That a true copy of said trial-examiner's report upon the facts, marked "Exhibit A," is attached hereto and is hereby made a part hereof.

6. That respondent's proceedings against petitioner were referred by respondent to said trial examiner for the taking of testimony therein, and said trial examiner made his said report upon the facts, under and in pursuance of Rule XII of respondent's rules of practice, a true copy of which said rule, marked "Exhibit B," is attached hereto and is hereby made a part hereof; that said trial-examiner's report upon the facts is a part of the entire record in the
520 proceedings by respondent against petitioner; that, as is stated in substance in said paragraphs 8 and 9 of petitioner's peti-

tion for review herein, and as appears from so much of the entire record in the proceedings before respondent as has been certified to this court, all of the evidence, including the oral testimony of eleven physicians, that was ever taken by respondent in its proceedings against petitioner, was taken before the said trial examiner exclusively, and no member of respondent Federal Trade Commission was ever present at the taking of any of said evidence; that the said trial examiner was the only trier of facts who ever heard the said eleven physicians testify, or had any opportunity to observe them while they were testifying, and to reach an informed conclusion as to their credibility; and that the said trial examiner, after hearing and considering all of the said evidence and testimony, made his aforesaid report upon the facts, Exhibit A aforesaid, and therein reported to respondent certain findings of facts based upon a consideration of all of the evidence and testimony adduced before him, and among other things concluded and reported to respondent (as is also stated more at length in paragraph 9 of petitioner's said petition for review) in substance as follows: (a) That all of said eleven physicians appeared to be of equally high standing and equally well informed; (b) that, however, there was a sharp conflict in their testimony; (c) that five of said physicians testified in support of respondent's contentions, and six of them in support of petitioner's contentions, in respect of the issues between respondent and petitioner that were in controversy before respondent; (d) that in view of the conflict in the testimony of the said physicians, it was extremely difficult to determine what the facts were in respect of the
521 issues that were in controversy between respondent and petitioner; (e) and that the conclusion properly to be reached, upon a consideration of all of the evidence, was that respondent and petitioner were involved in a scientific dispute the determination of which could not be safely or justly predicated upon the evidence.

7. That agreeably to respondent's Rule XII aforesaid, exceptions were duly filed by respondent and petitioner, respectively, to the said trial-examiner's report upon the facts; that the exceptions filed by petitioner to said report upon the facts did not go so much to show that the trial examiner had committed any error or mistake in his said report upon the facts as to answer and offset the exceptions that had been previously filed to said report upon the facts by respondent, and to show that respondent's said exceptions to said report upon the facts were groundless and unsustainable and should all be overruled; that said exceptions so filed by respondent and petitioner to said report upon the facts are so long as to render it impracticable to print them as a part of this motion, and that it is not essential to a proper disposition of this motion that said exceptions should now be before the court; that if respondent had acted agreeably to the findings and conclusions of the said trial examiner in his said report upon the facts, respondent could not have done otherwise than to

dismiss its proceedings against petitioner; that, however, respondent did not treat said report upon the facts as prima facie true and correct and give effect to the trial-examiner's findings and conclusions therein set forth, as it was respondent's duty to do; that, on the contrary, respondent largely ignored, rejected, and disregarded said report upon the facts, and in making its aforesaid findings as
522 to alleged facts substituted for the findings and conclusions as to facts made by said trial examiner, respondent's own findings and conclusions as to substantially all of the matters that were in dispute between respondent and petitioner, and in so doing substantially did nothing more than to repeat the statements that had been made by respondent in the complaint which it had initially filed against petitioner, and to find that said statements were true; that petitioner is informed and believes that respondent never made any formal rulings in respect of said exceptions so filed by respondent and petitioner, as aforesaid, to said report upon the facts, sustaining or overruling said exceptions, or any of them; that respondent never assigned to petitioner and, as petitioner is informed and believes, never assigned upon respondent's own records, any reason or reasons why respondent would not, and did not, give force and effect to the findings and conclusions as to the facts, and as to the credibility of witnesses, and as to the weight of the evidence, that were set forth in said report upon the facts so made, as aforesaid, by said trial examiner; that respondent never assigned to petitioner and, as petitioner is informed and believes, never assigned upon respondent's own records wherein or in what respect said trial examiner, in making his said report upon the facts, or in reaching the findings and conclusions therein stated, had committed any error or made any mistake; that respondent never gave petitioner any opportunity to combat by evidence or argument the considerations, whatsoever they may have been, which induced respondent to refuse to adopt the findings and conclusions made by said trial examiner, and to refuse to give full force and effect to said report upon the facts; that the only interpretation of which respondent's aforesaid acts and conduct in respect of said report upon the facts are susceptible is that
523 either respondent assumed, notwithstanding that it never saw or heard the witnesses who testified in the proceedings against petitioner, while the said witnesses were testifying, to proceed nevertheless to consider and decide questions of the credibility of said witnesses, and of the weight of the evidence given by said witnesses, and of whether the findings and conclusions as to the facts and as to the credibility of witnesses and the weight of the evidence, made by the said trial examiner in said report upon the facts, were true and correct, or else that respondent assumed to reject all testimony that had been adduced by petitioner before the said trial examiner without even so much as considering whether it was true or false; that respondent's acts and conduct in respect of said report upon the facts were, the premises considered, arbitrary and capricious and repug-

nant to the requirements of due process of law; that, the premises considered, respondent's findings and conclusions as to facts set forth in said paragraphs Five, Seven, and Eight of respondent's aforesaid written findings of alleged facts are arbitrary and capricious; and that, the premises considered, to give any force or effect to said findings and conclusions, or to respondent's order to cease and desist based thereon, would deprive petitioner of liberty and property without due process of law in violation of the fifth amendment aforesaid.

8. That in the prayer of its said petition for review petitioner prayed that respondent be required to include the said trial-examiner's report, and the exceptions thereto, in the transcript filed in this court of the record in respondent's proceedings against petitioner; that a copy of petitioner's said petition for review was duly served
524 upon respondent; and that respondent, by its counsel, notified counsel for petitioner informally that respondent would not include, and respondent has utterly refused, failed, and neglected to include, either the said trial-examiner's report upon the facts, or the exceptions thereto, in the transcript of record which respondent has filed in this court.

Wherefore petitioner respectfully prays as follows:

First. That this court may make and enter an order in this cause, directing that the respondent, Federal Trade Commission, shall forthwith certify the said trial-examiner's report upon the facts, together with all exceptions thereto, to this court by a supplementary return, as an addition to the transcript of record now on file in this court.

Second. If respondent ever made any formal rulings in respect of the exceptions filed by respondent and petitioner, respectively, to said trial examiner's report upon the facts sustaining or overruling said exceptions, or any of them, that then, in such event, the court may make and enter an order in this cause directing that the respondent shall forthwith certify the said rulings, if any, together with the reasons, if any, now appearing upon the respondent's records for such rulings, if any, to this court by a supplementary return, as an addition to the transcript of record now on file in this court.

STEVENSON, BUTZEL, EAMAN & LONG,
Attorneys for Petitioner, Raladam Company.

525 [*Duly sworn to by Rockwell T. Gust; jurat omitted in printing.*]

526 *Exhibit A to motion*

UNITED STATES OF AMERICA

Before Federal Trade Commission

Docket No. 1496

In the matter of RALADAM COMPANY

TRIAL EXAMINER'S REPORT UPON THE FACTS

(Dated December 10, 1926; indorsed "Confidential; for use of commission and counsel only.")

Pursuant to an order and designation of the Federal Trade Commission, the undersigned proceeded to hear and take testimony and receive evidence in the above-entitled cause.

Now, therefore, your examiner respectfully submits to the commission this his report upon the facts reached upon consideration of all the testimony and evidence adduced.

I

Respondent, Raladam Company, is a corporation organized and existing under and by virtue of the laws of the State of Michigan, the said corporation having been incorporated in January, 1927, and maintains its office and principal place of business in the city of Detroit, in the State of Michigan.

527 II

Respondent is engaged in the sale of a certain medical preparation or compound for internal use by human beings, made into the form of tablets of a size suitable for use by taking the same into the mouth and swallowing. The said compound or preparation is sold by the respondent under the trade name of "Marmola prescription tablets" as a palliative, treatment, or remedy for obesity. The respondent does not manufacture or compound the preparation itself, but the preparation is manufactured or compounded by Parke Davis and Company, manufacturing chemists, whose place of business is in the city of Detroit, in the State of Michigan, and who compound or prepare the tablets in accordance with a formula owned by the respondent.

III

The respondents offer for sale and sell the Marmola prescription tablets to wholesale druggists located in and throughout the several States of the United States, and the said wholesale druggists, the customers of the respondent, resell the said Marmola prescription

tablets to retail dealers in the various States of the United States, who in turn resell to the consumers or purchasers at retail. The respondent causes the said Marmola prescription tablets to be transported from the city of Detroit, in the State of Michigan, into and through other States of the United States to the purchasers thereof at their respective points of location or places of business.

528 IV

The respondent, in the course and conduct of its business as aforesaid, is in competition with other persons or corporations in and throughout the several States of the United States who are likewise engaged in offering for sale and selling palliatives, treatments, or remedies for the amelioration of individuals desiring to reduce weight.

V

Respondent, as a means of making known to the public and selling its preparation Marmola prescription tablets, advertises in newspapers, magazines, periodicals, and other publications of general circulation in the United States and the several States thereof, and in such advertisement make use of the following language:

"DON'T STARVE TO END FAT. There is an easier way, used for 19 years. Million of people know it. The results are seen in every circle. Excess fat is not nearly as common as it was. That way is Marmola prescription tablets, made to combat the cause of fat by correcting a gland weakness. The effects will surprise and delight you, and a booklet in each box tells you why they come." (Com. Ex. 6–a.)

"It reduces fat by correcting the gland cause, without abnormal exercise or diet. It is the modern, scientific way. * * * And the use has grown to very large proportions because the way is so easy, so pleasant, so helpful, so efficient." (Com. Ex. 6–b.)

"Marmola is the scientific method." (Com. Ex. 6–e.)

529 "Try the method which combats the cause—the modern scientific method. No abnormal exercise or diet is required. * * * Watch the fat disappear, watch your vigor increase. (Com. Ex. 6–f.)

"Not by abnormal exercise or diet. Not by sacrifice and danger. They combat the cause in an easy, pleasant, scientific way—by Marmola prescription tablets." (Com. Ex. 6–h.)

"You should know this method based on long scientific research. Diet and exercise often fail and often do much harm. Learn the results and benefits of this easy pleasant way. You simply take four tablets daily, then watch results. Reduction is never too rapid. Cease Marmola when you reach the weight desired and note how much better you feel." (Com. Ex. 7–a.)

"Some wonder if such results can be accomplished without harm. The evidence is everywhere. Countless people know that Marmola

brings benefits other than reduction. It could not live and prosper for nearly two decades without that." (Com. Ex. 7–b.)

"The modern way is Marmola prescription tablets based on many years of scientific research; here and abroad. They act to correct the cause." (Com. Ex. 7–c.)

"Overfat people suffer a handicap, to-day more than ever. People know that obesity is largely due to a gland disorder. Exercise and diet carried to extremes, may correct the result for a while. But the right way, the easy way, is to correct the cause." (Com. Ex. 7–f.)

"Strenuous exercise and starvation diet may reduce fat, but
530 the ways are hard and long and never ending. And they must be properly directed. There is an easy, pleasant way which millions have adopted. It acts to correct the cause of too much fat. That way is Marmola prescription tablets used for 19 years. * * * Marmola is based on many years of scientific research * * *. One simply takes four tablets daily. No abnormal exercise or diet is required. Stop when results are completed." (Com. Ex. 10.)

"The way is Marmola prescription tables used for 19 years. They act by correcting the cause, which usually lies in a gland. That gland controls the burning of food in the body. Stimulate it, and starch and sugar turn to energy and fuel rather than to fat. * * * The way is easy, pleasant, scientific. Simply take four tablets daily until your figure reaches normal." (Com. Ex. 9, sheet 16.)

"Twenty years ago scientific men discovered by long research, a cause of excess fat. And they found a way to remedy that cause. They proved it first by thousands of experiments first on animals, then on human beings. When effects were proved, the factors were embodied in Marmola prescription tablets, now used for two decades. Many people used them and watched the results, then told those results to others * * *. The use of Marmola requires no starvation nor over-exercise. But moderation helps. Simply take four tablets daily until the weight comes down to normal." (Com. Ex. 9, sheet 18.)

"Then try this modern method which has been used so widely for 20 years. It is based on wide scientific research which discovered a cause of excess fat. It lies in shortage of a certain substance which greatly affects nutrition. The way found to correct it is to feed a supply of that substance. That substance is embodied in Marmola pre-
scription tablets * * *. There are no secrets about Mar-
531 mola. The formula appears in every box, also an explanation of results—the loss of fat, the new health and vitality. This is done to banish every fear of harm." (Com. Ex. 9, sheet 19.)

"Over 20 years ago scientific men discovered a great cause of excess fat. They found a substance which nature employs to turn food into fuel and energy rather than into fat. They proved that an extra supply of that substance could check the formation of fat. That substance was embodied in Marmola prescription tablets." (Com. Ex. 9, sheet 21.)

"1905 * * *."

"Reduction at that time was a hard and harmful task. It meant strenuous exercise which is hard on the heart of the overfat. It meant starvation diet which leads to malnutrition. Thousands of women did themselves much damage by those methods. Then leading scientists took up the study. They found that habits in eating and exercise often had little effect. They found that the thyroid gland largely controls nutrition. The turning of food into fuel and energy depends on its secretion. They found a thyroid deficiency in many of the overfat. They made experiments on animals by feeding them thyroid, and the animals lost their fat. At the same time they gained in energy and health. After thousands of such experiments, they did the same with human beings, and the same results appeared.

"DOCTORS TRIED IT. Those scientists announced their findings, the doctors the world over began the use of thyroid for obesity." (Com. Ex. 9, sheet 70.)

Respondent in the course and conduct of its business, and to aid in the distribution and sale of its preparation, causes the Marmola prescription tablets aforesaid to be put up in a cardboard con-
532 tainer, upon which said container appears the words "Marmola is recommended as a treatment for the reduction of excessive fat," and among other words and figures upon said container appear under the heading "Directions" the following:

"Take one tablet after each meal and at bed time with enough water to swallow easily. If preferred, tablet may be broken into pieces before taking. This treatment should be faithfully taken as directed from 60 to 90 days in order to obtain the best results."

With the said container are packed the Marmola prescription tablets, together with a booklet entitled "Thank You for Trying Marmola Prescription Tablets."

This booklet contains the directions for the taking of the Marmola tablets, sets out in full the formula from which the prescription is prepared, which discloses that the active drugs in use in this prescription and desiccated thyroid one-half grain, cascara one-quarter grain, phenolphthalein one-quarter grain, and directs the taking of one tablet four times a day and states:

"This dosage is not intended to lead to rapid reduction. It would rarely exceed three or four pounds a week. Most authorities advise a moderate rate of reduction * * *. The rate of reduction differs with individuals. Habits also affect it so it is hard to state in a general way what the user may expect. Physicians in treating obesity often prescribe much larger doses of the Marmola factors but the consensus of opinion is that the dosage we direct, if taken regularly, seems to best fit the average case * * *. The chief purpose of Marmola is to feed and stimulate the thyroid gland which controls the combustion of food into the body * * *. The makers
533 of Marmola do not advise abnormal exercise or diet * * *.

But there is no question that reasonable habits in these respects greatly aid results * * *. Marmola is intended to aid

reduction without radical dangerous and unpleasant methods. This method is scientific. It embodies the chief factors, if not the only factors, employed by modern physicians for the purpose intended, that is, for correcting a thyroid deficiency. The Marmola prescription is based on years of work here and abroad by scientists in the field of glandular therapy. * * *. Moderation in the use of fat-forming foods will aid what you are seeking. Avoid starches and sweets in excess. Starchy foods include bread and potatoes. Cut down fatty foods. Instead of them, eat poultry, game, eggs, lean meat, clear soup, fish, and sea food. All kinds of fruit and fresh vegetables are good for you. Eat all you want of them, but be sparing of foods with high calory content like sugar, cereals, and fat. * * * The Marmola prescription contains desiccated thyroid taken from food animals. It is a concentrated food intended for weak thyroids particularly when that weakness shows itself in obesity."

"WHEN TO STOP

"The chief object of Marmola is to help correct thyroid deficiency. When that result shows a normal weight, it is well to stop Marmola. You neither wish to be abnormal nor supernormal in respect to fat. The right rule is to take Marmola until you reach normalcy. A table in this pamphlet tells your proper weight. * * *. Consult your own physician if you want special advice in any unusual condition. The Marmola prescription, made for the multitudes, considers the average person simply seeking to reduce. A physician in extreme cases might hurry the treatment. Or he might add certain factors. But that requires personal contact. If you desire more advice than we give you in this book, get it from a man who can meet you. We do not prescribe in special cases by letter."

534 The package above described also contains an envelope enclosing a sample of a laxative which is recommended for use with Marmola should the party using Marmola find a laxative needed.

VI

The thyroid gland is one of the ductless glands present in human bodies and in animals used for human food. Its full and complete functions have probably not yet been revealed to medical science but for more than thirty years it has been known to have a direct effect upon oxidation and when under-functioning causes a lowering of the metabolic rate and when over-functioning produces a raising of that rate. Its under-functioning may either alone or together with other causes such as over-eating and a want of exercise bring about an increase in weight resulting in some individuals in a condition known as obesity. Its over-functioning may, other conditions being normal and unchanged, bring about an opposite effect and cause the individual to lose weight, or at any rate prevent the taking on of weight.

Desiccated thyroid, or thyroid extract as it is frequently termed in the testimony, is a preparation made from the thyroid glands of food animals which for more than thirty years has been recognized as a medicament by the medical profession and has been and is used by the members of that profession for the alleviation or cure of various ailments of human bodies. Its use, its effects, have been carefully studied. Thousands of experiments have been made upon animals and human beings. The drug is recognized and carried in the United States Pharmacopœia, the tenth and last revision of the U. S. P. gives a standard dose of one grain. This does not mean that more than a grain may not be given at a dose, nor that
535 less than a grain may not be used, and the one-grain dose may be repeated within any given period of time as the experience of the physician may indicate to him is necessary. The drug is recognized, standardized, and is used in the scientific treatment of human ailments.

Desiccated thyroid has been found to be useful in the treatment of obesity, and of the eleven physicians who testified in this cause, ten of them use it at times in obesity cases; six of them use it regularly as a part of their treatment for obesity. The dosage among those who use it regularly varies from two to ten grains per day. (Tr. pp. 365, 411, 453, 559.)

VII

Eleven physicians have testified in this cause. These men, as far as can be gathered from seeing and hearing them testify, from weighing their qualifications as given in evidence, appear all of them to be of high standing in their profession. They are all members of the American Medical Association and of other medical associations in their respective States, and all of them appear to be acquainted with thyroid as a medicament, but there is a sharp variation in their testimony, five of them testifying that—

"Thyroid is a dangerous drug." (Tr. pp. 68, 148, 150, 183, 239, 262, 309.)

"A prescription containing one-half grain of thyroid to be taken four times a day, an aggregate of two grains a day, would be a sufficient amount of thyroid to produce toxic effects in most people. And by toxic effects they state that they mean symptoms of a phenomena such as hyperthyroidism, which is an abnormal state produced by excessive amounts of thyroid secretion or thyroid activities. It manifests itself in various ways. The first phenomena that is noticed is weakness and rapid heart action and nervousness, tremors and sweating, sleeplessness, and the loss of weight and strength." (Tr. pp. 69, 142, 150, 184–6, 245, 159, 309.)

536 "People vary very much in the rate of metabolism and that it is quite necessary that they should be under careful medical supervision and that the dose should be accurately determined so that the rate may not be increased beyond that which is the normal rate, and that it is not good practice and is unsafe to

prescribe the same amount of thyroid for every patient." (Tr. pp. 82, 83, 86, 142, 187.)

"A patient taking thyroid during the treatment should be under continuous or certainly occasional medical supervision, once a week anyway, in taking thyroid." (Tr. pp. 85, 98, 148–9, 256, 309.)

"The Marmola prescription tablet preparation is not the result of and is not based upon scientific research, knowledge, and accuracy and it is not a scientific method of the treatment of obesity." (Tr. pp. 87, 88, 150–1, 190, 261, 317–8.)

"Self-medication is a bad thing; any drug that has an action, which is not inert, may produce toxic effects." (Tr. pp. 107–8, 159.)

"A restricted diet unsupervised by a doctor may produce harmful results." (Tr. p. 113.)

"Disagreeable symptoms of nervousness, tremor, rapid heart, which may follow the administration of thyroid, all disappear with the stoppage of the drug, soon thereafter, four or five or six days." (Tr. pp. 114, 121, 417.)

Six of them testify that—

"Thyroid in U. S. P. doses or less is not toxic. A toxic action is an action which produces an injurious result in the patient." (Tr. pp. 248–9, 406, 419, 464–501, 512.)

"The average obese person without medical supervision can take Marmola prescription tablets for a period of from sixty to ninety days under the instructions, directions, and advice con-
537 tained in the booklet without harm." (Tr. pp. 367, 371, 412, 460, 541, 562.)

"Marmola tablets would be effective to reduce weight in the average obese individual." (Tr. pp. 95; 369, 372, 461, 562.)

"The formula from which the Marmola tablets are prepared is based on scientific research and accuracy and has a scientific foundation for use as a remedy for obesity." (Tr. pp. 367, 371, 396, 412–3, 463, 465.)

"The Marmola tablets may be taken safely according to the directions and advice given without previous consultation with a doctor." (Tr. pp. 371, 372, 412, 418, 460–1, 465, 534, 541, 562.)

"The formula of Marmola tablets is a practical and available remedy for the average case of obesity." (Tr. pp. 367, 372, 464.)

"The dosage given would not produce toxic symptoms in the average obese person otherwise healthy." (Tr. pp. 372, 379.)

"It is safe to put a person upon a dosage of two grains of thyroid a day for a period of thirty to ninety days without examination, provided it was accompanied by instructions to consult your own physician if you want any special advice on any unusual condition." (Tr. p. 379.)

"The preparation would act with uniformity upon the users thereof and can be taken safely in accordance with directions." (Tr. pp. 412–3, 461, 463.)

VIII

With such conflict as is shown by this record, it becomes extremely difficult to determine what is the fact in connection with the statements alleged to have been made by the respondent that the
538 Marmola prescription tablets are a scientific method based on long scientific research; that its medicinal properties are safe, pleasant, and effective; that said tablets may be used by purchasers thereof without discomfort, inconvenience, or danger of harmful results to the physical health of such users; that said tablets are a scientific method for the treatment of obesity.

We appear to be involved in a scientific dispute the determination of which can not be safely or justly predicated upon the evidence contained in this record.

Respectfully submitted,

EDWARD M. AVERILL,
Trial Examiner.

539 *Exhibit B to motion*

RULE XII OF FEDERAL TRADE COMMISSION'S RULES OF PRACTICE AND PROCEDURE AND STATEMENTS OF POLICY, JANUARY 1, 1928

XII. HEARINGS BEFORE EXAMINERS

When issue in the case is set for trial, it shall be referred to an examiner for the taking of testimony. It shall be the duty of the examiner to complete the taking of testimony with all due dispatch, and he shall set the day and hour to which the taking of testimony may from time to time be adjourned. The taking of the testimony, both for the commission and the respondent shall be completed within 30 days after the beginning of the same unless, for good cause shown, the commission shall extend the time. The examiner shall, within 10 days after the receipt of the stenographic report of the testimony, make his report on the facts, and shall forthwith serve copy of the same on the parties or their attorneys, who, within 10 days after the receipt of same, shall file in writing their exceptions, if any, and said exceptions shall specify the particular part or parts of the report to which exception is made, and said exceptions shall include any additional facts which either party may think proper. Seven copies of exceptions shall be filed for the use of the commission. Citations to the record shall be made in support of such exceptions. Where briefs are filed the same shall contain a copy of such exceptions. Argument on the exceptions, if exceptions be filed, shall be had at the final argument on the merits.

When, in the opinion of the trial examiner, engaged in
540 taking testimony in any formal proceeding, the size of the transcript or complication or importance of the issues involved warrants it, he may of his own motion or at the request of counsel at

the close of the taking of testimony announce to the attorneys for the respondent and for the commission that the examiner will receive at any time before he has completed the drawing of the trial-examiner's report upon the facts a statement in writing (one for either side) in terse outline setting forth the contentions of each as to the facts proved in the proceeding.

These statements are not to be exchanged between counsel and are not to be argued before the trial examiner.

Any tentative draft of finding or findings submitted by either side shall be submitted within 10 days after the closing of the taking of testimony and not later, which time shall not be extended.

541 [Minute entry of argument and submission, Feb. 12, 1930, omitted in printing.]

542 In the United States Circuit Court of Appeals, Sixth Circuit

Decree

Filed June 28, 1930

Appeal from the Federal Trade Commission.

This cause came on to be heard on the transcript of record from the Federal Trade Commission and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the order or decree of the said Federal Trade Commission in this cause be, and the same is, hereby reversed.

543 In United States Circuit Court of Appeals, Sixth Circuit

No. 5429

RALADAM COMPANY, PETITIONER

vs.

FEDERAL TRADE COMMISSION, RESPONDENT

Petition to review an order of the Federal Trade Commission.
Decided June 28, 1930

Before DENISON and HICKS, Circuit Judges, and COCHRAN, District Judge

Opinion

Filed July 1, 1930

DENISON, Circuit Judge: The so-called patent-medicine habit has a traditional hold upon masses of the American people. The medical profession has always contended that auto-diagnosis, drug-store pur-

chases, and self-medication are dangerous to the public health and ought to be suppressed or minimized. The evil, at least in some degree, is not to be denied; but how it should be stopped has been considered an insoluble problem. This record reveals the solution. The type of advertising which has long been customary for the commercial promotion of these remedies [1] is to be condemned by the Federal Trade Commission; and thereupon, the appropriate United States Circuit Court of Appeals is to stop it by injunction. The proprietor of the particular remedy here involved challenges the power and right of the commission in these respects, and brings this petition for review.

For many years, and particularly of recent years, vast numbers of persons have desired to reduce their weight. Whether
544 there was accumulation of fatty tissue beyond the normal standard for that person, a real obesity—or whether there was a mere desire to be more slender, the tendency went to such an extent as to become a craze or a fad. Every one knew that a diminution of food intake, diet, or an increase of muscular effort, exercise, would tend to bring reduction. These things were prescribed and controlled by doctors and institutions, and were promoted by propaganda unmeasured. More than twenty years ago scientific research developed the theory that the consumption of fatty tissue which brought weight reduction was a process of oxidization; the excess could by analogy be considered as burned in the body tissue cycle. The theory was also developed that the normal secretion of the thyroid gland was an effective agent in bringing about or accelerating this oxidization. Still later it was found that the medicinal use, by mouth or subcutaneously, of the substance of this same gland taken from food animals would supplement and so increase the effect of the human thyroid gland. Still later, it was learned, or at least came to be and still is believed by the medical profession, that the rate of such tissue consumption in a particular patient can be measured by observing the amount of oxygen used by that patient in a given period of breathing. Experiments indicate the average or normal rate, appropriate to a particular age, height, etc., and this has been named the basic metabolic rate; for short, the doctors call it the B. M. R. The use of the devices which have been ingeniously contrived for measuring this oxygen consumption by the patient they call the metabolism test. So much for background and scenery.

Some twenty years ago, and while the underlying theory of the thyroid-gland action was known rather exclusively to men of science and was not the subject of much popular knowledge, the predecessors of the Raladam Company, which was the respondent before the Federal Trade Commission, and is the petitioner in this review, devised what they called a remedy, or treatment, for obesity. The primary active agent was a preparation of the thyroid gland of

[1] We use "remedy" in the common, though not accurate, sense as meaning an article to be used as a treatment for an ailment, and tending to relieve or cure.

animals, either in extract or desiccated form. The remedy contained also drugs, for their collateral effect, and other substances for body, flavor, etc. They named it "Marmola." Their advertising and other methods of promotion progressively varied, but when this proceeding was commenced petitioner and they had been, for some years, furnishing the article only for ultimate sale by the retail drug trade and not selling directly to the user. They were doing very extensive advertising, both in the so-called national magazines and
545 periodicals and in the daily and weekly local newspapers. The result had been a very large and profitable business. Each package as sold contained a considerable number of these Marmola tablets, and upon the package and in the enclosed leaflet were directions and advice in regard to the use of the treatment. The specifically important points in this advertising and these directions will be developed later.

The commission filed this complaint. It alleged that the Raladam Company was using unfair methods of competition in that its advertising contained a considerable number of false statements and claims. The Raladam Company answered. Testimony was taken before a trial examiner. In accordance with the rules of the commission, he made his report, stating conclusions of fact and of law like a master in chancery; and, also pursuant to the rules, each party filed exceptions, and the exceptions were argued before the commission. Without reference to, or mention of the examiner's findings or the exceptions thereto, the commission thereupon made its findings of fact, to the effect that the advertising claims were false and injurious to the public in certain particulars, and thereupon made its order that the Raladam Company should desist and refrain in the particulars specified. Within due time the respondent before the commission brought this petition for review, alleging that the commission's findings were not supported by the evidence, and that it lacked jurisdiction for the reasons and in the particulars specified. It prayed that the order to desist and refrain be vacated. The commission filed an answer, taking issue on the petition. It then proceeded, by analogy to equity practice, to file a cross bill, and pray that the court enjoin the petitioner from such advertising and other conduct as the commission had forbidden.

The petitioner has asked that this quasi cross bill be dismissed because not authorized by any rule or by general equity practice. This motion was continued until final hearing; and we now find it unnecessary to make any ruling thereon.

The commission's order to desist and refrain contains six specific prohibitions against advertising. Taken together, they reduce to two; they forbid the representation that Marmola is a scientific remedy for obesity; and thereupon they forbid advertising Marmola as a remedy for obesity unless the statement is added that it is not safe to be taken except under the supervision of a competent physician.

Before taking up the merits, we notice a matter of practice. The record showed that the proofs were taken before a trial exam-
546 iner. He acted as a master or trial judge does. He ruled upon testimony, admitting or excluding; he frequently asked questions and directed and controlled counsel; he obviously felt that responsibility was upon him for the primary decisions which would stand unless overturned; then he made his findings, which he returned to the commission with the evidence. In making up the record for this review the commission did not include these findings. Petitioner insists that since the statute contemplates rules of practice by the commission, and since the commission has made rules assigning these duties and functions to the trial examiners, and since the commission does not ordinarily itself see the witnesses, such findings became a proper part of the record for review. In reply it is said that, since the commission's findings of fact must stand, if supported by any evidence, the development of the matter before the commission in this particular is immaterial. There are no Circuit Court of Appeals rules on this subject. Lacking them, it has been held that such findings need not be included; and we think that exclusion is supported by the better reason and so we deny the motion to include; but we direct that if the record is prepared for review by the Supreme Court, this motion to bring in the examiner's findings be included in that record. In the margin we give these findings, both to illustrate the question of practice presented and because they make a clear summary of one view of the question in dispute.[2]

The first question raised is whether the advertising representations as to the scientific character and the safety of the remedy are statements of fact or are opinions. If the latter it is conceded that the commission could not transform them into matters of fact, and it is said that as they were matters of opinion and the opinions were held in good faith and were not unreasonable, the prohi-
547 bitions in the commission's order can not be sustained. There is, in the petition filed by the commission, no claim that the representations as to science and safety, were fraudulent and not made in good faith, or were so obviously and clearly unsound that they could not plausibly be held by any intelligent person. There being no issue as to fraud or bad faith, no proofs were taken on

[2] Eleven physicians have testified in this cause. These men, so far as can be gathered from seeing and hearing them testify, from weighing their qualifications as given in evidence, appear all of them to be of high standing in their profession. They are all members of the American Medical Association, and of other medical associations in their respective States, and all of them appear to be acquainted with thyroid as a medicament, but there is a sharp variation in their testimony, five of them testifying that: [Marmola is unscientific and unsafe.] Six of them testify that: [To the contrary.] With such conflict as is shown by the record, it becomes extremely difficult to determine what is the fact in connection with the statements alleged to have been made by the respondent that the Marmola prescription tablets are a scientific method based on long, scientific research, that its medicinal properties are safe, pleasant, and effective; that said tablets may be used by purchasers thereof without discomfort, inconvenience, or danger of harmful results to the physical health of such users; that the said tablets are a scientific method for the treatment of obesity. We appear to be involved in a scientific dispute the determination of which cannot be safely or justly predicated upon the evidence contained in this record.

either side and such suggestions as are now made with that aspect must be disregarded.

Coming to this question, "fact or opinion": It is clear that the adjectives "scientific" and "safe" have ordinarily no absolute meaning. Nothing is absolutely safe, not even water to drink; nothing is so scientific to-day that it may not be discarded to-morrow; or so chimerical to-day that it may not be scientifically accepted to-morrow. It was long a scientific fact that the world was flat; long travel under the sea or in the air, was a scientific impossibility; Darius Green was the archetype of credulous ignorance. These merely illustrate that whether any particular plan or theory is scientific, in a fair sense of the word, is typically and generally a matter of opinion. If sometimes it is a matter of fact, that is exceptional.

Upon observing the disputes between doctors who are witnesses as to whether this remedy may properly be dubbed scientific, it is at once seen that there is no particular conflict between them except as to the meaning of the word as here used. The witnesses for the Raladam Company refer to accepted medical theories, scientific theories, by proper definition, and to the fact, somewhat mysterious but now accepted by scientists, that the thyroid extract supplements the effect of the patient's own thyroid gland, and that this causes an increase in the metabolic rate and so increases the fat elimination. They see also that an additional burden is put upon the organs of ultimate elimination, that laxative drugs are therefore "indicated," and are found in the Marmola composition. For these and other reasons they regard it as "scientific"; and it is, we think, plain beyond dispute that, if we use a considerable breadth of definition, they are right. The witnesses for the commission insist that no treatment for obesity, or in fact for anything else, is "scientific," and no remedy can be scientifically prescribed or be considered itself scientific, unless there is first a thorough examination of the patient, to learn his condition in all respects, lest some treatment indicated by one symptom fail to do good, or indeed, do harm because of the patient's condition in some other respect. Particularly as to obesity, they insist that there should be a metab-
548 olism test, in order to make a scientific basis for deciding how much thyroid extract it is proper to give, or indeed, to decide, as far as diagnosticians do decide, whether the obesity is due to a thyroid deficiency or to a deficiency in some other gland, or to no cause at all except eating too much. Undoubtedly these doctors also are right, if we give to the adjective "scientific" the particular and extreme construction which they do.

Considering and contrasting these views, it seems to us quite impossible to say that the problem whether this remedy, in the environment of these advertisements, is or is not "scientific" is a question of fact, capable of being dogmatically fixed, in one way or the other, as disputed facts are decided. We think that it was at the begin-

ning of the proceeding and continued to the end to be a matter of opinion; and, in final analysis, a matter of opinion as to what definition of the word was more appropriate to the circumstances.

The same conclusions prevail in the matter of "safety." The Raladam Company advertised that Marmola tablets were safe to take. It is difficult to see that the form of his representation, so long as it is merely general, is of much importance. Within wide limits, there would be an implied assurance of safety in taking any food or drug placed on the general market; but the assurance, whether expressed or implied, would always need construction and could mean only, while kept in general terms, that if it were used reasonably, or in accordance with instructions, it would be reasonably safe. To illustrate: Much is said in the testimony and the proofs about the toxic or poisonous quality of thyroid extract. There is no reason to doubt that it could be given in such quantity, or in the presence of such conditions of bodily disease, that the effect would be very deleterious, whether "toxic" or not; but it is equally clear, and is admitted by the commission's counsel, that there is no drug or active agent in the entire bounds of materia medica which is not, by the same definition, poisonous.[3] No non-inert drug is known which will not produce very dangerous results if taken in extreme quantity, or under certain abnormal conditions. It is, we think, apparent beyond dispute from this record that if these Marmola tablets were to be taken at such a rate that the patient would get half a grain of thyroid per day, there would be no serious contention that there would usually be any substantial danger or any lack of ordinary safety; while if the quantity of extract to be administered were 20 grains a day, there would be no denial that a substantial degree of danger was created. The quantity taken, therefore, must be the vital thing upon which the doctors base their opinion as to danger. The commonly accepted standard as to the whole subject of materia medica is the United States Pharmacopœia, which, in its current edition, expresses what is thought to be the current professional view. It defines the various drugs and their medicinal effects and states a dosage, which is understood to be the ordinary or average dose for adults where the drug is "indicated." The stated dosage contemplates repetition to get three or four doses a day. The dosage given for thyroid extract was, in the earlier editions, 4 grains, and in a later edition 2 grains, and in the current edition 1 grain, thus now contemplating a daily dosage of 3 to 4 grains. Each Marmola tablet contains ½ grain and the directions are to take 3 or 4 per day. The patient, therefore, receives 1½ or 2 grains per day, and the treatment is directed to continue for 60 days unless, within that time, sufficient reduction should occur or unless unusual conditions develop. In the latter instance the user is directed to consult a physician. The specific question,

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[3] It "may be described as a deadly poison or as a valuable item of the Pharmacopœia according to the rhetorical purposes in view." (Mr. Justice Holmes in Coca-Cola Co. v. Koke Co., 254 U. S., at p. 145.)

therefore, is whether this amount of thyroid taken in this way is so inherently and characteristically dangerous to the patient as to make that danger a fact, as distinguished from a reasonable scope of conflicting opinion.

It seems to us that the commission has itself decided this question upon the theory of opinion rather than of fact, when it has found that it is all right for the public to take Marmola if the taking is under the supervision of a physician. This necessarily means that there is no inherent or certain danger, but that the professional opinion of the physician, as to whether administration or continuance is wise, ought to be always at hand.

The nature of the controversy is further indicated by the nature of the supposed danger and the professionally advised precautions. Obesity is very commonly the result, at least in part, of hypothyroidism. Of such a case the doctors say that the patient has a minus B. M. R. of 20 or 40, or whatever the rate may be. To such a patient they would properly give thyroid extract until he reached at least the normal B. M. R.; but they say that if the patient has a rate well above normal metabolism, hyperthyroidism, giving this remedy will increase the hyperthyroidism, and that may bring bad results. No one disputes this; but the answer, as bearing upon general, typical danger, is, first, that people who have hyperthyrodism, or
550 tuberculosis or any other specified disease where thyroid extract would be contra indicated, are not usually looking for obesity remedies; they are already too thin; the advertisement is not to or for them. The second is that the results produced by too much thyroid are those which are generally called nervousness, including over-tension, loss of sleep, etc. Whenever these unusual conditions develop, the directions are to stop the treatment and consult a physician. An unknown fraction of those in whom these symptoms develop might persist in the treatment with the result of aggravating these symptoms; but, even then, it would be pointed out that the harmful results might be due to the starvation diet or the excessive exercise which these reducers were tempted to employ. Any study of the evidence, however casual or however thorough, leads to and compels the conclusion that the whole subject of "safety" stands upon the same basis as that of "science." The commission's witnesses believe that this extract should not be given to a patient until after a metabolism test to make sure (or rather to make probable) that the patient has a thyroid deficiency rather than an excess. Equally important, they think, is a complete examination to indicate that there is no heart lesion or kidney disease or other serious condition, for if there is, there should be consideration as to the advisability of stimulating the thyroid action; it might or might not be wise. These same witnesses frankly agree that they have the same view about all other active drugs or agents. They think that such things do harm sometimes and hence that none should ever be administered excepting after a professional study of the case—as one doctor frankly put it, "as thorough an examination as the patient

can pay for." All this merely comes to saying that they think the drug-store sale of Marmola is unsafe, because they think, no active drug or agent should be by the public self-prescribed or self-administered. The same conclusion, if from a strict standpoint, is inevitable as to a hundred so-called standard remedies sold over the counter to everyone who wants them; not one of them is, according to the standard of safety thus advocated, safe for popular use and consumption. Very likely every member of this court will personally fully agree with this professional opinion that such public self-medication is unwise, and then go out and buy quinine or aspirin, or anything else that he is told will help his particular ailment.

These various considerations merely confirm what to us is clear, even upon first glance, that whether it is "safe" for the the public to buy and take Marmola according to instructions is not a matter of fact. It is a matter of expert opinion, as to which there
551 are as many shades and degrees as there are experts who discuss it, and as to which a nonexpert board can hardly have been intended to be umpire. We concede, of course, that questions of fact must often be decided upon conflicting opinion or expert evidence, and that, too, by a tribunal of laymen; but questions so to be decided admit of categorical answer; scientific (?) and safe (?) do not.

Three Supreme Court cases are urged upon us as controlling or important and they should have attention. We think no one of them has anything like the scope here claimed for it. In the McAnnulty case (187 U. S. 94) there is a discussion as to the difference between fact and opinion and it was held that, for the purposes of that case, the falsity of an opinion was not sufficient. There, however, the criterion was fraud; and there was no showing that the speaker did not honestly hold the opinion which he stated, and, the thing not being impossible on its face, fraud was not made out. In Seven Cases v. U. S. (239 U. S. 510) and Leach v. Carlisle (258 U. S. 138) the question also was one of fraud. The holdings were merely in complement to the McAnnulty case, that if an opinion was not, in truth, held, or if it was of such character that it could not be honestly held by the speaker, the charge of fraud might be maintained, although the expression was only one of opinion. We can not see in these cases any particular bearing on the question here.

Argument is made and cases cited to the effect that when a claim or statement of therapeutic value is shown to be false, the mere belief by the utterer in its truth will not protect the statement against suppression, nor necessarily protect the utterer against punishment. Such cases are wide of the mark. If, in the present case, the petitioner had claimed that Marmola would tend to reduce fat, and this claim had been proved untrue, even though the proof was only from a fair concensus of expert opinion, it would not be important, for some purposes, that the petitioner believed it to be true. We have nothing of that kind here. There is no denial of the therapeutic effect of Marmola as a treatment for obesity. Thyroid furnishes the recog-

nized treatment, approved by all physicians; the complaint is not that Marmola has no therapeutic effect but that it may have too much; and we come directly back to the question whether we may take, not as an opinion but as a fact, that it is neither scientific nor safe to advertise and sell it as an effective remedy to be taken without medical supervision; and we come again to the conclusion that this is a matter of expert opinion determined by the particular
552 expert's conception of science and of safety.

Before leaving the subject of "safety," it should be pointed out that there is no finding, nor any evidence, that any substantial part, or any particular part, of that public to which these statements are addressed, the obese public, the average or usual or ordinary obese person, would be reasonably likely to be harmed by the advised use of these tablets. The fair inference is that the actual harm would be occasional and rather exceptional. There is only the chance that the user may be of the exceptional class; upon that contingent basis rests the finding of general danger.

Another contention should be noticed: Petitioner says to the public, whether the statement happens to be in a printed form or orally, that this remedy is safe to be taken according to directions by the average person; the commission orders that the petitioner shall not make this statement unless modified in form to suit the commission; that is, unless accompanied by the statement that it is safe only when medically supervised. Thereupon the court, acting as a court of equity, is asked to enjoin the publication. Petitioner contends that such injunction would be a violation of the first amendment, and that its constitutional right to freedom of speech prevents such suppression. This contention is forcefully made, but we find it unnecessary to pass upon it.

A broader question of the jurisdiction of the commission underlies. In the Silver case (289 Fed. 985) one member of the court took occasion (p. 992) to study the history of the creation and purposes of the Federal Trade Commission. The conclusion was reached that the commission came into being as an aid to the enforcement of the general governmental antitrust and antimonopoly policy, and that its lawful jurisdiction did not go beyond the limits of fair relationship to that policy. Since that opinion there has been no decision of the Supreme Court inconsistent therewith, nor any Circuit Court of Appeals decision which expressly denies that theory.[4]
553 Doubtless there have been opinions from these latter courts which are more or less inconsistent with its full acceptance;[5]

[4] Attention is drawn to the comment which the Supreme Court, in its opinion in Federal Trade Commission v. Klesner (280 U. S. 19, 26–7), made upon the Beechnut case and the Winsted case. The comment is that in neither case did the private right of any competing trader appear to have been invaded. As we noted in our opinion in the Toledo Pipe-Threading Co. case (11 Fed. (2d) 337, 343), the Beechnut case needed no evidence of unfair competition with any one. The practice involved and condemned was the price restriction policy. This had been expressly found illegal under the antitrust act (Miles Medical Co. case, 220 U. S. 373), and expressly declared illegal by the Clayton Act. The whole ground of illegality of price restriction is that it restrains competition between trade competitors. To have considered this ground in making application to the Beechnut case, would have been supererogation. The opinion in the Winsted case expressly declares (p. 493): "The practice constitutes an unfair method of competition as against

but the accuracy of the historical study then made has never, so far as we know, been particularly challenged, either by judicial opinion or in the periodical literature of the law. This court, as now constituted, is prepared to and does adopt the general view there stated, as to the foundation of the commission's jurisdiction. See also our opinion in Beskey and Gay v. F. T. C., this day filed.

The thing forbidden by the statute is unfair competition. This can not exist unless there is competition, and there can not be competition unless there is something to compete with. It must be evident that the trade which was to be protected against restraint (and unfair competition is a kind of restraint) was that legitimate trade which was entitled to hold its own in the trade field without embarrassment from unfair competition. The first thought might be that the one invoking protection should be a particular trader; but the Winsted case (258 U. S. 483) teaches that protection will also be given under this statute to the entire class of trade which is having its former customers taken away from it by false representations that the competing goods are of the same descriptive qualities as those put out by the complaining class. It is apparent from this record, as well as from other recent or pending cases in this court and other decisions of the commission and from announcements by its members shown in this record, that the commission does not take this limited view of its jurisdiction, but that it believes itself authorized to issue its "desist and refrain" orders in any case where it concludes that sales methods may mislead a substantial part of the purchasing public, in a way and to an extent that,
554 in the judgment of the commission, is injurious to the purchaser. The general law of unfair competition uses the misleading of the ultimate retail purchaser as evidence of the primarily vital fact, injury to the lawful dealer; the commission uses this ultimate, presumed injury to the final user as itself the vital fact. The result is a realization of what was suggested in the former opinion as the opened vista (289 Fed. 992–3) and a pro tanto censorship by the commission of all advertising. This particular case relates to medicine advertising, and of a class doubtless disapproved by the "best people," who can afford to employ good doctors; but that disapproval can not create jurisdiction. The record here shows, without dispute or by implication which would hardly be denied, that the American Medical Association is engaged in a campaign against

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manufacturers of all wool knit underwear and as against those manufacturers of mixed wool and cotton underwear, who brand their product truthfully, for when misbranded goods attract customers by means of fraud which they perpetrate, trade is diverted from the producer of truthfully marked goods." And again (p. 494) after finding that the public had an interest in stopping the practice as wrongful: "And since the business of its trade rivals who mark their goods truthfully was necessarily affected by that practice, the commission was justified," etc. It seems quite clear that the Klesner opinion in making reference to the Beechnut case and the Winsted case as not involving invasion of the private right of any trader competed against, intended to put the emphasis upon the right of a private or individual complaining competitor; and is not inconsistent with the necessity of injury to the class of "honest manufacturers" who were named and directly protected in the Winsted case, and who were in the background in the Beechnut case.

[4] We do not so regard Proctor v. F. T. C. (C. C. A. 6—11 Fed. (2d) 47). The direct and large-scale competition between petitioner's Naphtha soap and the brand of soap long on the market under that descriptive name was unquestioned.

these proprietary remedies, which, it believes, ought to be used by the public either not at all or only under supervision. It has a bureau for that and other purposes, and the bureau employs a director. When it is thought that a particular advertisement should be stopped, this director takes the matter up with the commission and with the association of "better business bureaus" which are scattered over the country. Thereupon the commission, if it approves, files a complaint and eventually, if it is convinced of the truth of its complaint, makes the order to desist and refrain. The better business bureaus explain to their local newspapers and to the general periodicals that it would be wise to refuse this advertising. The chairman of the commission, in public addresses, and in correspondence, advises the newspapers that they will be subject to prosecution by the commission as defendants, to be joined with the advertisers, if they do not desist from such publications; and the newspapers may suspect that if they do not comply with the advice of the better business bureaus, their general advertising patronage from the membership of these bureaus will fall off. It appears that these methods of influence, carried on in this case before this cross suit for enforcement was commenced and while it has been pending, have destroyed a large part of petitioner's business through refusals to accept this advertisement, and only the injunction of this court is needed to make the elimination complete. We have no occasion to deny, nor indeed, reason to doubt, that this elimination would tend to the public good; but we can not think that Congress had any conception that it was creating a tribunal for that kind of action. Its failure for many sessions to pass a proposed "pure fabric" law, and others of similar character, is familiar; but if the commission's view of its jurisdiction is right, these laws are unnecessary.

555 When we search this record to find the legitimate activities which are to be protected against this unfair competition, we observe only two such possible beneficiaries. One is the medical profession. It can not be seriously contended that the act was intended to protect any profession against encroachment; the aid of the commission might be as logically given to physicians and surgeons as against chiropractors, or to lawyers as against incompetent will-draftsmen.

The other possible beneficiary is found in the list which the American Medical Association Bureau has made up, comprising a number of other commercially exploited remedies for obesity, which have been advertised or found in the drug stores within recent years. Some of them are perhaps still being sold in substantial quantities, though that is left very vague. It is fairly to be inferred, not only that these are on the same index expurgatorius as Marmola, but that they are relatively disreputable.[6] Again, it can not be seriously contended that the machinery of the commission was intended to give

[6] A question intended to develop this positively, rather than to leave it inferential, was ruled out by the examiner. This was error, but the situation is too plain to require reference for further proofs.

governmental aid to the protection of this kind of trade and commerce.

We conclude therefore that the record does not show any basis for the action of the commission. The prayer of the petition will be granted and that of the cross bill denied.

556 [Clerk's certificate to foregoing transcript omitted in printing.]

557 Supreme Court of the United States

Order allowing certiorari

Filed November 3, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted, the briefs and argument to be limited to the question of the jurisdiction of the Federal Trade Commission.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Indorsement on cover:] File No. 35406. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 484. Federal Trade Commission, petitioner, vs. Raladam Company. Petition for a writ of certiorari and exhibit thereto. Filed September 27, 1930. File No. 35406.

U. S. GOVERNMENT PRINTING OFFICE, 1931

FILE COPY

No. 484

In the Supreme Court of the United States

OCTOBER TERM, 1930

FEDERAL TRADE COMMISSION, PETITIONER

v.

RALADAM COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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PETITION

The Solicitor General and the Chief Counsel of the Federal Trade Commission, in behalf of the Federal Trade Commission, pray that a writ of certiorari issue to review the decree of the Circuit Court of Appeals for the Sixth Circuit entered in the cause between the above-named parties on June 28, 1930, which reversed an order of the Federal Trade Commission requiring the respondent to cease and desist from certain methods of competition alleged to be unfair and in violation of Section 5 of "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes," c. 311, 38 Stat. 717.

STATEMENT

A complaint issued by the Federal Trade Commission on February 29, 1928, charged the Raladam Company (hereinafter referred to as the "respondent") with the use of unfair methods of competition in interstate commerce, in violation of Section 5 of the Federal Trade Commission Act, in the sale and offering for sale of the medical preparation "Marmola Prescription Tablets" as a cure for obesity and as a treatment for the removal of excess flesh. (R. 2-6.) The complaint alleged that one of the ingredients of such preparation was the powerful drug "thyroid," which respondent asserted was effective in the reduction of fat; that this drug produced radical changes in the human body and could be safely administered only under the direction of a competent physician. It alleged further that respondent in advertisements in publications of general circulation and in pamphlets made statements that were false and misleading to the purchasing public to the effect that the preparation was a scientifically accurate method of treatment based on the results of extended scientific research, and that it was a safe, effective, and dependable agent for the removal of excess flesh which might be used by the purchaser without discomfort or danger.

After respondent had filed an answer (R. 7-19), the Federal Trade Commission appointed an Examiner (R. 20), before whom testimony was taken (R. 32-371). A hearing was held before the Fed-

eral Trade Commission, which made a report in writing, in which it found the facts to be substantially as alleged in the complaint. (R. 21-25.) The Commission thereupon ordered respondent, in connection with its sale and advertising and offering for sale of the product "Marmola," to cease and desist from representing that the preparation was a scientific method for treating obesity, and from representing that it was safe and harmless, unless that representation be accompanied by a statement that it could not be taken with safety to physical health except upon the advice and under the direction of competent medical authority. (R. 26-27.)

The Commission found as a fact (R. 42) that the respondent was engaged in interstate commerce, and that its product was sold in competition with other persons throughout the United States; and these facts were expressly admitted by the respondent in the court below (p. 1 of respondent's brief in the Circuit Court of Appeals). Evidence before the Commission showed that the respondent annually sells in this country over 1,000,000 packages (R. 48) of its preparation "Marmola," and its annual receipts amount to $600,000 (R. 34). The preparation is marketed by the respondent through wholesale druggists in every State. Large quantities of the preparation are shipped in interstate commerce. (R. 35.)

Respondent filed a petition in the Circuit Court of Appeals for the Sixth Circuit asking that the order of the Federal Trade Commission be set aside.

(R. 376.) The Commission filed an answer in the nature of a cross bill asking for a decree to enforce its order. (R. 401.) An answer was filed by respondent to the cross bill (R. 411), and a motion was made by petitioner to strike out portions of the answer to the cross bill (R. 508), upon which the Circuit Court of Appeals made no ruling. The Circuit Court of Appeals entered a decree reversing the order of the Federal Trade Commission on June 28, 1930. (R. 540.)

The answer of the respondent and evidence before the Commission tended to show the following facts:

The use of the product "Marmola" is based on the theory that the normal secretion of the thyroid gland is an effective agent in oxidizing and reducing fatty tissue. (R. 80, 81, 195, 197, 329.) "Marmola" contains the drug "thyroid" which is sometimes used as an artificial aid in this oxidization process. (R. 9, 13, 14, 51.)

Respondent's product is widely advertised and offered for sale as a scientific remedy for obesity and overweight. (R. 11, 12, 14, 61.) The cause of 95% of the cases of obesity, however, lies in excess eating, and in but 5% of the cases is there any subnormal thyroid activity. (R. 202.) In the former cases, regulation of diet is the only effective remedy. (R. 175.) "Marmola" may reduce weight temporarily in such cases, but affords no perma-

nent relief. (R. 185–186.) The drug "thyroid" may properly be used as a flesh reducer only in the case of thyroidal obesity. (R. 177, 339.) Even in that case it is in no sense a remedy, since its use tends to make the thyroid gland even less active, thus intensifying the disease. (R. 74, 337.) The drug "thyroid" is accordingly used by competent physicians only to correct the results of subnormal thyroid activity, while at the same time a cure for the disease itself is being employed. (R. 128, 129.)

The product "Marmola" is sold under the further representation that it is a safe and harmless remedy for obesity and overweight and that it may be employed without ill effects by persons who are simply trying to reduce weight. It is represented that the average person should use the preparation in order to reduce to average weight, which average weights are set out in the advertisements of the respondent. (R. 10, 12.) It is a matter of general knowledge among physicians that the drug "thyroid" burns all of the tissues of the body—with the fatty tissues being consumed more rapidly. (R. 81, 83, 105, 106, 185, 220.) In every case it increases the burning of the tissues of the body in proportion to the amount taken. (R. 81, 83.) There are many bodily conditions which preclude the use of "thyroid" entirely. (R. 117, 177–179, 185, 209, 216.) Its use is harmful, unless administered under medical supervision, and in many cases its use is dangerous. (R. 73, 115, 116, 140,

142, 144, 177, 179, 215, 217, 319.) The preparation "Marmola" is used by many persons who have no excess flesh (R. 319), in which case the vital tissues must be affected. None of the physicians who testified prescribed the use of the drug "thyroid" without first having examined the patient. (R. 83, 85, 116, 141, 177, 217, 257, 285, 308, 342, 356.)

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred—

(1) In denying the jurisdiction of the Federal Trade Commission under Section 5 of the Federal Trade Commission Act to order the discontinuance of false representations, made in connection with the advertising and offering for sale of a product, which are calculated to mislead a substantial part of the purchasing public without evidence of injury to honest competitors.

(2) In drawing an inference that there was no competition between respondent and honest dealers engaged in the manufacture of similar remedies, in the absence of any proof of that fact.

(3) In holding that the findings of the Commission that "Marmola" was not a scientific or safe remedy for the treatment of obesity were not, for purposes of appellate review by the Circuit Court of Appeals, findings of fact but expressions of opinion, and, as such, not conclusive if supported by testimony, as provided in Section 5 of the Federal Trade Commission Act.

(4) In holding in effect that the findings of the Commission that "Marmola" was not a scientific or safe method for the treatment of obesity or the removal of excess flesh were not supported by testimony, and were, therefore, not conclusive upon review by the Circuit Court of Appeals, as provided in Section 5 of the Federal Trade Commission Act.

(5) In failing to rule upon petitioner's motion to strike out respondent's answer to paragraphs "G" and "H" of petitioner's answer in the nature of a cross bill, and in reciting in its opinion the allegations of respondent's answer as established facts in the case, although no issue was formed thereon and no evidence adduced, and in basing its decision in part upon such allegations.

REASONS FOR GRANTING THE WRIT

1. The case presents a question of public importance which should be decided by this Court. It requires a determination of the extent of the jurisdiction of the Federal Trade Commission, under Section 5 of the Federal Trade Commission Act, in protecting the purchasing public against false advertising.

The Circuit Court of Appeals denied the jurisdiction of the Commission, under Section 5, to enter an order restraining false and misleading advertising, calculated to deceive a substantial portion of the purchasing public, in any case where the court, in the absence of any affirmative showing to the contrary, draws the inference from the character

of the trade engaged in by the advertiser that there are no honest competitors whose trade would be protected by the Commission's order. This construction of the Federal Trade Commission Act is novel and, we submit, erroneous.

2. The decision below in this respect would operate to place an unwarranted limitation on prior decisions of this Court in *Federal Trade Commission* v. *Klesner*, 280 U. S. 19; *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483; and *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441. (These cases are discussed on pp. 13–15, *infra*.) The decision in this respect is also in apparent conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in *Hills Bros.* v. *Federal Trade Commission*, 9 F. (2d) 481, 485, and with the decision of the Circuit Court of Appeals for the Second Circuit in *Butterick Co.* v. *Federal Trade Commission*, 4 F. (2d) 910. (These cases are discussed on pp. 15–16, *infra*.)

3. The Circuit Court of Appeals failed to give effect to the findings of the Commission that the respondent's product "Marmola" was not a "safe" and "scientific" remedy for the treatment of obesity, or for the removal of excess flesh, as represented in the respondent's advertisements, although such findings were supported by testimony, and, therefore, were conclusive upon that court under Section 5 of the Federal Trade Commission Act. The court held in effect that such findings were questions of opinion rather than matters of fact

and, therefore, not conclusive, even if supported by testimony. The decision of the court below on this point appears to be in conflict with the decision of this Court in *Seven Cases* v. *United States*, 239 U. S. 510, with the decision of the Circuit Court of Appeals for the Third Circuit in *Eleven Gross Packages, etc.*, v. *United States*, 233 Fed. 71, and with the decision of the Circuit Court of Appeals for the Fifth Circuit in *Hall* v. *United States*, 267 Fed. 795.

Wherefore it is respectfully submitted that the writ of certiorari should be granted.

THOMAS D. THACHER,
Solicitor General.

ROBT. E. HEALY,
General Counsel,
Federal Trade Commission.

SEPTEMBER, 1930.

BRIEF IN SUPPORT OF PETITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 541–550) is not yet reported.

JURISDICTION

This was a petition to the Circuit Court of Appeals for the Sixth Circuit to review and set aside an order of the Federal Trade Commission entered under authority of Section 5 of "An Act to Create a Federal Trade Commission, and to define its powers and duties, and for other purposes," c. 311, 38 Stat. 717. The decree of the Circuit Court of Appeals reversing the order was entered June 28, 1930. (R. 538.) The jurisdiction of this Court is invoked under Section 5 (Paragraphs 4 and 5) of the Federal Trade Commission Act, c. 311, 38 Stat. 717, and under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Federal Trade Commission has jurisdiction, under Section 5 of the Federal Trade Commission Act, to enter an order requiring the seller of a patent medicine to cease and desist from making false representations as to the therapeutic

effect of his product, where there is no affirmative showing that *honest* competitors are injuriously affected, but it does appear that the respondent's sales are in competition with other persons, "who are likewise engaged in offering for sale and selling printed professional advice, books of information and instruction, and other methods, means, remedies and appliances for dissolving or otherwise removing excess flesh of the human body."

2. Whether representations that a remedy is "scientific" and "safe," made in connection with the advertising and offering for sale of a patent remedy for reducing flesh, are matters of fact or of opinion for the purpose of determining whether findings by the Federal Trade Commission as to their falsity are "conclusive if supported by testimony," within the meaning of Section 5 of the Federal Trade Commission Act.

STATUTES INVOLVED

Section 5 of the Federal Trade Commission Act (Act of September 26, 1914), c. 311, 38 Stat. 717, 719, is set forth in part in the appendix, *infra*, pp. 21–24.

STATEMENT

A statement of the facts and of the errors relied on will be found in the petition.

ARGUMENT

I

UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT THE COMMISSION MAY PROHIBIT FALSE REPRESENTATIONS IN ADVERTISING A MEDICAL PREPARATION, ALTHOUGH ITS ORDER IS NOT SUPPORTED BY TESTIMONY THAT COMPETITORS DO NOT LIKEWISE MAKE FALSE REPRESENTATIONS

The Circuit Court of Appeals in considering the broad question of the jurisdiction of the Federal Trade Commission under Section 5 of the Federal Trade Commission Act said (R. 548, 550):

> The thing forbidden by the statute is *unfair* competition. This can not exist unless there is competition, and there can not be competition unless there is something to compete with. It must be evident that the trade which was to be protected against restraint (and unfair competition is a kind of restraint) was that legitimate trade which was entitled to hold its own in the trade field without embarrassment from unfair competition. * * *
>
> * * * * * *
>
> When we search this record to find the legitimate activities which are to be protected against this unfair competition, we observe only two such possible beneficiaries. One is the medical profession. It can not be seriously contended that the Act was intended to protect any profession against encroachment—the aid of the Commission

might be as logically given to physicians and surgeons as against chiropractors, or to lawyers as against incompetent will-draftsmen.

The other possible beneficiary is found in the list which the American Medical Association Bureau has made up, comprising a number of other commercially exploited remedies for obesity, which have been advertised or found in the drug stores within recent years. Some of them are perhaps still being sold in substantial quantities, though that is left very vague. It is fairly to be inferred, not only that these are on the same *index expurgatorius* as Marmola, but that they are relatively disreputable. Again, it can not be seriously contended that the machinery of the Commission was intended to give governmental aid to the protection of this kind of trade and commerce.

It is submitted that this is not a correct exposition of the law relating to the jurisdiction of the Federal Trade Commission under Section 5 and should not be adopted by this Court.

It is clear that the Federal Trade Commission has jurisdiction to enter an order enjoining false labeling calculated to deceive a substantial portion of the purchasing public, even in the absence of an affirmative showing of injury to any individual competitor, on a presumed injury to competitors as a class, arising out of deception of the public. *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483. In *Federal Trade Commission* v.

Beechnut Co., 257 U. S. 439, the Court condemned a system of resale price restriction enforced by the respondent, inferring that competition among retail distributors was suppressed. The Court in *Federal Trade Commission* v. *Plesner*, 280 U. S. 19, 27, commenting on these cases, stated:

> But to justify the Commission in filing a complaint under Section 5, the purpose must be protection of the public. The protection thereby afforded to private persons is the incident. Public interest may exist although the practice deemed unfair does not violate any private right. In *Federal Trade Commission* v. *Beechnut Packing Co.*, 257 U. S. 441, a practice was suppressed as being against public policy, although no private right either of a trader or of a purchaser appears to have been invaded. In *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483, an unfair practice was suppressed because it affected injuriously a substantial part of the purchasing public, although the method employed did not involve invasion of the private right of any trader competed against.

The court in the present case states that in the patent remedy field there is no honest competition which could be protected by the enjoining of false and misleading representations. The Commission found that the respondent was in competition with other persons engaged in selling advice, appliances, and remedies for reducing fat. (R. 22.) There

was evidence supporting this finding (R. 111–112) and there was no testimony which would support the court's inference that there are no other manufacturers who are honestly confining their representations as to the effect or character of their remedies within lawful bounds. If the Federal Trade Commission is required to base its orders enjoining false advertising on an affirmative showing of injury to honest competitors, each action will require trial of the legitimacy of the activities of other competitors. The difficulties which would follow from such an interpretation are indicated by the Circuit Court of Appeals for the Ninth Circuit in *Hills Bros.* v. *Federal Trade Commission*, 9 F. (2d) 481, 484–485 where the court said:

> The petitioner also offered to prove that a concern in Los Angeles was selling coffee, and that publishers throughout the country were selling magazines, at fixed prices in other states, under agreements to maintain these prices, and refused to sell to dealers who would not maintain the prices agreed upon. An objection to this class of testimony was sustained, and the ruling is assigned as error. If the concerns in question did nothing more than the petitioner has done, according to its own contention, they did not violate the law, nor has the petitioner violated the law, for reasons hereinafter stated. If, on the other hand, the petitioner has violated the law, it would avail nothing to prove

> that others were equally guilty. Proof of the methods employed by others would be of little avail in any event, unless the methods employed were similar, and in order to determine the similarity of methods the commission would be compelled to hear and try many cases, instead of only one. There was no error in the rulings complained of.

In the case of *Butterick Co.* v. *Federal Trade Commission,* 4 F. (2d) 910, 912, the Circuit Court of Appeals for the Second Circuit, in holding unlawful a system fixing the resale price of patterns, stated:

> The argument that other competitors are doing substantially what the petitioners do has no effect. It is not important.

See also *Yale and Towne Mfg. Co.* v. *Alder,* 154 Fed. 37, 38 (C. C. A., 2d); *Chamber of Commerce of Minneapolis* v. *Federal Trade Commission,* 13 F. (2d) 673, 686 (C. C. A., 8th).

The court below conceded that a showing of deception of the public by false advertising is evidence of injury to lawful dealers in the "legitimate trades." To confine the application of that principle to the reputable trades would have the effect of placing under the jurisdiction of the Federal Trade Commission the class of advertising cases in which trade ethics are generally on a high plane, and in which, correspondingly, the purchasing public is less apt to be misled, and to leave the

public at the mercy of those whose morals are assumed by the court to be generally questionable. Even if there were any basis for the inference drawn by the court that no honest competitors were affected (which we deny), it would not serve as ground for denying jurisdiction of the Federal Trade Commission, but would tend to show that there was need for more and not less supervision over their advertising activities. We submit that the Federal Trade Commission Act (pp. 21–24, *infra*) gives no indication of an intention of Congress to confine the jurisdiction of the Commission to cases in which there is an affirmative showing of competition with honest competitors.

II

THE FINDINGS OF THE FEDERAL TRADE COMMISSION THAT RESPONDENT'S PRODUCT WAS NOT A SCIENTIFIC OR SAFE REMEDY WERE FINDINGS OF FACT, AND, BEING SUPPORTED BY TESTIMONY, WERE CONCLUSIVE ON THE COURT BELOW.

The Circuit Court of Appeals held that the adjectives "scientific" and "safe" as employed by respondent in its advertising, with reference to the medical properties of the product "Marmola," were terms the use of which could only be based upon opinion and that the Commission in finding the product not to be a scientific or safe remedy was, in effect, only expressing its opinion and was not deciding a question of fact. The court there-

fore felt free to reverse the finding of the Commission, although it was supported by ample evidence. If the determination of the Commission that "Marmola" is not a safe or scientific remedy is a finding of fact, under Section 5 of the Federal Trade Commission Act (p. 23, *infra*), this determination, which was supported by evidence, would have been binding on the court on review.

This Court in *Seven Cases* v. *United States*, 239 U. S. 570, held that the curative effect of a remedy could be determined as a question of fact. To the same effect are the decisions in *Eleven Gross Packages, etc.*, v. *United States*, 233 Fed. 71 (C. C. A. 3rd), and *Hall* v. *United States*, 267 Fed. 795 (C. C. A. 5th). We submit that, in a similar way, whether a remedy is "safe" or "scientific" may be determined as a fact.

With reference to whether "Marmola" is a scientific remedy for obesity, there is evidence to show that "Marmola" contains the drug "thyroid" which is sometimes employed to consume fatty tissues in cases of thyroidal obesity. (R. 9, 13, 14, 51.) But obesity is due in 95% of the cases to causes other than subnormal activity of the thyroid gland. (R. 202.) In 95% of the cases, therefore, "Marmola" is in no sense a remedy. Even in cases where there is subnormal thyroid activity, resulting in obesity, "Marmola" is not a cure. (R. 185–186.) It impairs rather than aids the normal

functioning of the thyroid gland. (R. 74, 337.) Therefore the Commission's finding that the remedy is not a scientific one was a proper finding of fact.

The same is true of its finding that it is not a "safe remedy." Respondent represented "Marmola" as a safe remedy to persons who were obese, to those who were slightly overweight, according to standard tables, and to those who were desirous of reducing, irrespective of overweight. (R. 10, 12.) There was no dispute as to the effect of the drug "thyroid," the principal constituent of "Marmola." Its effect is to oxidize or to burn tissue. (R. 81, 83, 85, 106–220.) But there are many bodily conditions which preclude the use of "thyroid" entirely. (R. 177–179, 209–216.) None of the physicians who testified prescribed the use of the drug "thyroid" without first having examined the patient. (R. 82–83, 85, 116, 141, 177, 217, 257, 285, 308, 342, 356.)

If the findings of the Commission as to the therapeutic effect of "Marmola" based on this testimony are not findings of fact, then all conclusions reached on the basis of expert testimony would likewise seem to be matters of opinion.

CONCLUSION

It is submitted that the decision of the Circuit Court of Appeals is erroneous, and in view of the general importance of the questions decided that

the petition for the writ of certiorari should be granted.

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SEPTEMBER, 1930.

APPENDIX

Section 5 of the Federal Trade Commission Act (Act of September 26, 1914, c. 311, 38 Stat. 717, 719, provides, *inter alia:*

> That unfair methods of competition in commerce are hereby declared unlawful.
>
> The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.
>
> Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair methods of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease

and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the commission, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission. If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or car-

ries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. The findings of the commission as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any,

for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission shall be exclusive.

* * * * *

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No. 484

In the Supreme Court of the United States

OCTOBER TERM, 1930

FEDERAL TRADE COMMISSION, PETITIONER

v.

RALADAM COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

SUPPLEMENTAL MEMORANDUM IN BEHALF OF PETITIONER

In the Supreme Court of the United States

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SUPPLEMENTAL MEMORANDUM IN BEHALF OF PETITIONER

The brief of respondent in opposition to our petition for certiorari comments upon the fact that certain exhibits which were considered by the Circuit Court of Appeals but were not copied in the printed record in that court are not before this Court. In order that this Court may examine these exhibits if it sees fit, we are filing the same with the Clerk of this Court at this time.

We submit that it is unnecessary for the Court to examine the exhibits. They were introduced before the Federal Trade Commission to show what representations the respondent made in its advertisements. The nature of these representations can not be disputed. Respondent (petitioner in the Circuit Court of Appeals) stated in its brief filed in that court (pp. 10–11):

> In Paragraph Six of its findings of facts (R. 23, 11, 16–31), respondent found that petitioner, in its advertising matter, had in fact made the representations that are

charged, in Paragraph Five of the complaint as above quoted (R. p. 3, l. 47, to p. 4, l. 11), to have been made by petitioner. The language of the finding in that regard is, without any material variation, the same as the language of the complaint.

No objection is made in petitioner's petition for review to said finding in Paragraph Six of respondent's findings of fact. Petitioner accordingly stands in this court substantially in the position of admitting that in its advertising matter concerning its Marmola Prescription Tablets it did make, in substance, the representations that are charged in the complaint, in Paragraph Five thereof as above quoted, to have been made.

Respectfully submitted.

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BRIEF FOR THE FEDERAL TRADE COMMISSION

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BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINION BELOW

The opinion of the Circuit Court of Appeals for the Sixth Circuit (R. 469) is reported in 42 F. (2d) 430.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on June 28, 1930. (R. 469.) Petition for certiorari was filed September 27, 1930, and was granted November 3, 1930, "the briefs and argument to be limited to the question of the jurisdiction of the Federal Trade Commission." (R. 480.)

Jurisdiction of this Court rests on Section 5 of the Federal Trade Commission Act, c. 311, 38 Stat. 717, 719 (U. S. C., Title 15, Sec. 45), and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. *Federal Trade Commisison* v. *Klesner*, 280 U. S. 19.

QUESTION PRESENTED

Whether the Federal Trade Commission has jurisdiction to issue an order against the vendor of an alleged obesity remedy to cease and desist from representing that its product is safe and scientific, based on findings of the Commission upon conflicting evidence that these representations are false, that they tend to deceive the public, and that the remedy is sold in interstate commerce in competition with other alleged remedies for obesity.

STATUTE INVOLVED

The relevant portion of Section 5 of the Federal Trade Commission Act is set forth in the Appendix, pp. 41–44, *infra*.

STATEMENT

A complaint issued by the Federal Trade Commission charged that respondent made false statements in aid of the sale of its alleged obesity cure, designated "Marmola Prescription Tablets," which constituted unfair methods of competition in interstate commerce in violation of Section 5 of the Federal Trade Commission Act. (R. 2–6.) After re-

spondent had answered and testimony had been taken before an examiner, the Commission filed a report of its findings of fact and conclusion and issued a cease and desist order. (R. 7, 21, 26.)

The Commission found that respondent's Marmola Prescription Tablets were manufactured for it by Parke, Davis & Co., under a formula furnished and owned by respondent; that the asserted effectiveness of respondent's fat-reducing remedy was principally based on one-half grain of thyroid which each tablet contained; that the tablets also contained three powerful laxatives; and that upon the box in which the tablets were sold were directions to take internally four tablets a day for a period of from 60 to 90 days. (R. 21–23.) In Paragraph Six the Commission found that respondent advertised Marmola in newspapers, magazines, periodicals, and other publications of general circulation in the United States and in these advertisements made the following representations (R. 23):

> 1. That the preparation of said Marmola is the result of, and is based upon, scientific research, knowledge and accuracy;
>
> 2. That its medical properties are safe, pleasant and effective in their action in the removal of excess flesh from the body;
>
> 3. That the same may be used by purchasers thereof without discomfort, inconvenience or danger of harmful results to

the physical health of the users of such compound;

4. That the said Marmola is a scientific method for the treatment of obesity and is based on many years of scientific research in the United States of America and in foreign lands.

In Paragraphs Seven and Eight the Commission found that each of these representations was false and misleading and that they tended to mislead and deceive the purchasing public. (R. 23–24.)

The Commission also found that respondent sold Marmola Prescription Tablets to wholesale druggists and jobbers in every State in the United States; that these druggists and jobbers resold the tablets to retail druggists throughout the country; and that the latter, in turn, resold them to consumers. (R. 22.) The Commission (Paragraph Four) found that respondent in the course and conduct of its business was in competition throughout the United States with others likewise engaged in offering for sale and selling "other methods, means, remedies and appliances for dissolving or otherwise removing excess flesh of the human body." (R. 22.)

The Commission concluded that respondent's practices "are to the prejudice of the public and respondent's competitors and are unfair methods of competition in commerce and constitute a violation of" the Federal Trade Commission Act. (R.

25.) It consequently ordered respondent, in connection with advertising and selling Marmola in interstate commerce (R. 26–27), to cease and desist from:

1. Representing that "Marmola" is a scientific and accurate method for treating obesity;

2. Representing that the formula from which "Marmola" is made is a scientific formula;

3. Representing that "Marmola" is the result of scientific research;

4. Representing that "Marmola" can be taken without the advice and direction of competent medical authority as a safe and harmless remedy in the treatment of obesity;

5. Representing that "Marmola" can be taken with no harmful result to physical health without the advice and direction of competent medical authority;

6. From representing "Marmola" as a remedy for the treatment of obesity unless such representation is accompanied by a statement that "Marmola" can not be taken with safety to physical health except under the direction and advice of competent medical authority.

Respondent within due time filed a petition in the Circuit Court of Appeals for the Sixth Circuit praying that the Commission's order be set aside. (R. 373–380.) The petition did not allege any error in the findings contained in Paragraph Four

or Paragraph Six of the Commission's report relating, respectively, to the sale in interstate commerce of competitive remedies and appliances and to the representations made by respondent in advertising Marmola. (R. 376–378.) The Commission filed an answer in the nature of a cross bill asking for a decree affirming its order and later made a motion to strike out certain portions of respondent's answer to this cross bill. (R. 385, 387, 452.)

The Circuit Court of Appeals, without discussing whether respondent's representations were calculated to mislead the public to which they were addressed, said that whether respondent's remedy was scientific or not depended upon the latitude of definition given that word, and that whether its remedy was safe or not could not be categorically answered, in view of the conflict between the testimony of the physicians called as witnesses by the Commission and those called by respondent. (R. 472–476.) The court accordingly interpreted the representations of respondent against which the Commission's order was directed as expressions of opinion and said that as there was no contention that the representations were not made in good faith or that they "were so obviously and clearly unsound that they could not plausibly be held by any intelligent person," the Federal Trade Commission had no authority to order respondent to cease and desist from making such representations. (R. 472, 476–477.) The court, under this view of the

law, and the facts, considered it immaterial that there was testimony to support the Commission's findings that respondent's representations were false and misleading.

The court also said that the record did not disclose any competitors who would be injured by respondent's practices except physicians and manufacturers of "other commercially exploited remedies for obesity." (R. 479.) It said that the Act was not intended to protect "this kind of trade and commerce"; that injury to the public alone was not sufficient to establish unfair competition within the meaning of the Act; and that the Commission in this case therefore lacked jurisdiction. (R. 477–480.) A decree was entered reversing the Commission's order. (R. 469.)

This Court has limited the argument to the question of the Commission's jurisdiction, but we conceive that certain facts disclosed by the testimony may be of importance in deciding the jurisdictional question. We therefore call attention to the following testimony:

Respondent, a Michigan corporation with offices in Detroit, Michigan, was organized in January, 1927, to take over the business, except the mail-order business, of the Marmola Company. (R. 38, 46–47.) The latter had been selling Marmola tablets since 1907, but in 1927 it was dissolved following a citation by the Post Office authorities to show

cause why a fraud order should not be issued against it and hearings thereon. (R. 40, 44.)

Respondent does a gross annual business of about $600,000 and sells over 1,000,000 boxes of Marmola a year. (R. 34, 48.) Each box, which retails for $1, contains 36 Marmola tablets, a booklet[1] which gives directions and advice for taking Marmola and names its ingredients, an envelope with four sample Dilaxin pills (a laxative preparation sold by respondent), and a circular headed "Use Dilaxin with Marmola." (R. 34, 43, 56.)

Edward D. Hayes, the owner of substantially all the stock of respondent, is the general manager and his sister the vice president of respondent and a Miss Moss and a Miss Hannon are the only other officers or directors of respondent. (R. 33, 46.) Hayes was the president of the Marmola Company and owned it at the time of its dissolution. (R. 39, 45.) He and one Ray, of the Ray Chemical Company of Detroit, organized the Marmola Company for the purpose of marketing a formula for the treatment of obesity which the Ray Chemical Company had evolved. (R. 39, 49.) During the early years of the Marmola Company this formula was

[1] This booklet is a part of Com. Ex. 2. By stipulation of the parties this and other exhibits were treated as physical exhibits in the Circuit Court of Appeals (R. 2) and they have been filed with the Clerk of this Court. There are only trivial variations between this booklet and the booklet (R. 417–424) used by respondent after the Commission issued its cease and desist order (R. 383).

made by the Ray Chemical Company, and it was subsequently made by two other drug concerns before being made by Parke, Davis & Co., the present manufacturer of Marmola. (R. 38–39.) Hayes is not a doctor, has never studied medicine, does not have a degree of any kind, knows nothing about drugs except what he has gathered as a layman from his business experience, has not carried out any scientific research, and was not certain that he had known the doctor who originated the formula for Marmola. (R. 49, 52, 54.) Since 1907 the quantity of thyroid in Marmola tablets has been decreased, first from one grain to three-fourths of a grain and then from three-fourths of a grain to one-half a grain, but otherwise there has been no material change in the formula. (R. 50–52.) The various ingredients in Marmola, other than thyroid and the three laxatives, are used to give it body and respondent does not claim that they have any effect in bringing about weight reduction. (R. 53, 422.)

When thyroid, which is made from the thyroid gland of animals, is taken internally it accelerates the patient's consumption of oxygen, thereby increasing the burning up of food products and bodily tissues. (R. 80, 87, 106.) Thyroid so taken enters the blood stream and stimulates all cells—the muscle tissues, the kidneys, the liver, the nervous system, and the brain. (R. 80, 106.) In this oxydizing process carbohydrates (chiefly sugar)

are first consumed and then fat. (R. 198–199.) The normal consumption of oxygen, dependent upon weight, age, and sex, has been measured and is called the basic metabolic rate. (R. 273.) Thyroid increases the rate of metabolism whether the individual's metabolic rate is normal, definitely below normal (hypothyroidism), or definitely above normal (hyperthyroidism). (R. 81, 92.)

Thyroid was first used about 40 years ago as a remedy for cretinism and myxedema, diseases where the thyroid gland is either largely absent or atrophied. (R. 173.) Some of the physicians testifying for the Commission had used thyroid, in connection with dietetic control, as a treatment for obesity when the patient's metabolic rate was subnormal. (R. 93, 116.) But in only a very small per cent of obesity cases is the condition due to deficient thyroid glands. (R. 174.) Insufficient pituitary, suprarenal, or reproductive glands may cause obesity, and one doctor testified that probably 95% of all cases were caused by overeating and lack of exercise; that is, by an intake of food in excess of the amount consumed by the body's activities. (R. 174–175.) According to a second doctor, true thyroid obesity was the rarest type known and about 90% of all cases of obesity were due to overeating and underexercise. (R. 147.) A third doctor reported, after going over his records in obesity cases, that only about 2% to 3% showed hyperthyroidism in the metabolism tests. (R. 216.)

Thyroid gives only temporary relief. Soon after its use has been stopped a patient will begin to take on fat again unless he employs other methods of weight reduction. (R. 185–186.) And if a person takes Marmola as directed by respondent he is likely to weaken his organic resistance to obesity. Such a person would introduce into his system a much larger amount of thyroid than the normal secretion of the thyroid gland, with a consequent tendency to underfunctioning and degeneration of that gland. (R. 73–75.)

Of the eleven physicians called as witnesses, five by the Commission and six by respondent, not one testified that he prescribed Marmola. None of these physicians administered thyroid, or would administer a daily two-grain dose (the amount contained in four Marmola tablets), without giving the patient a prior physical examination. (R. 85, 116, 141, 177, 217, 254, 285, 308, 348, 356, 366.) All the physicians called by the Commission stated that Marmola could not be self-administered in the doses advised and suggested by respondent without endangering the health of a substantial number of users. (R. 73, 115–116, 141–142, 187–188, 215.) There was testimony that taking this amount of thyroid would in very many cases cause a toxic condition, characterized by weakness, rapid heart action, nervousness, tremors, sweating, sleeplessness, diarrhea, fast pulse, or even delirium (R. 73, 115, 141, 215); that thyroid should never be taken by a per-

son over sixty years old (R. 177) or by a person having kidney trouble (R. 179, 216); that it would always be harmful to a person with heart lesions (R. 179); that it should be given most cautiously to a woman at the time of her change in life (R. 216); that in some cases it would lower the general health level and make the user more susceptible to infection (R. 216); that a physician before administering thyroid should determine the patient's blood pressure, his heart action, and the condition of his kidneys, and inquire into his age and personal habits (R. 177).

Illustrations of the effect of the self-administration of thyroid were given. A woman who had started taking two grains of thyroid a day or less was thrown into a state of hyperthyroidism with a swelling of the thyroid gland and had to be put in ice and given complete rest to prepare her for an operation to remove the gland. (R. 219.) In another case, a woman, if she took a grain a day for five or six days, immediately got palpitation and a very fast pulse. (R. 148.) A very stout woman, after taking a grain and one-half a day, had vertigo, palpitation, headaches, and was exceedingly nervous. (R. 148.) Taking one-fourth of a grain of thyroid has been known to cause very harmful results.[2] (R. 186.)

[2]An offer of testimony that a patient who stated that she had been taking Marmola showed symptoms of overdoses of thyroid was excluded by the examiner on the respondent's objection that the testimony was hearsay. (R. 75–79, 108.)

Dr. Haverstock, one of respondent's witnesses, gives an obese person, after a superficial physical examination lasting ten or fifteen minutes, a *minimum initial* daily dose of six grains of thyroid, which he sometimes later increases to forty grains. (R. 365–366.) He never prescribes exercise or diet and generally increases the thyroid dose until he observes in the patient a trembling of the knees or hyperthyroidism. (R. 363, 369.)

The respondent's own witnesses seem to discredit any such medical practice. Dr. Keeton usually gives two grains of thyroid a day. (R. 248.) The average dose of Dr. Stone, who has treated very few obesity cases (R. 283), is one grain given three, four, or even five times a day (R. 275). Dr. Tenney begins with two-fifths of a grain three or four times a day. (R. 300, 309.) Dr. Hulbert always first subjects an obese person to diet and exercise and gives thyroid only if he finds that a glandular condition is a contributing cause; he indicated three grains a day as an average dose. (R. 335, 339.) Dr. Funck starts with three or four grains a day, sometimes more and sometimes less. (R. 351–352.)

Hayes, the owner of substantially all of respondent's stock, testified that bath salts for the reduction of flesh were being sold in the different States. (R. 66.) One of the physicians named four different antifat medicines or remedies which were then being sold in interstate commerce. (R. 183–

184.) The Director of the Bureau of Investigation of the American Medical Association named 18 remedies for the treatment of obesity which he believed, after investigation, were all being marketed. (R. 111–112.) Six of them he found currently on sale in Chicago drug stores. (R. 112.) He testified that the concerns marketing three others were then in business and that four others had been advertised in 1928. (R. 159–163.) The remaining remedies he had seen advertised or had seen letters of inquiry concerning them subsequent to January 1, 1927. (R. 132.)

SPECIFICATION OF ERRORS TO BE URGED

Among the specifications of errors set forth in the Commission's petition for writ of certiorari were the following:

(1) The Circuit Court of Appeals erred in denying the jurisdiction of the Federal Trade Commission under Section 5 of the Federal Trade Commission Act to order the discontinuance of false representations, made in connection with the advertising and offering for sale of a product, which are calculated to mislead a substantial part of the purchasing public without evidence of injury to honest competitors.

(2) The Circuit Court of Appeals erred in drawing an inference that there was no competition between respondent and honest dealers engaged in the manufacture of similar remedies, in the absence of any proof of that fact.

(3) The Circuit Court of Appeals erred in holding that the findings of the Commission that "Marmola" was not a scientific or safe remedy for the treatment of obesity were not, for purposes of appellate review by the Circuit Court of Appeals, findings of fact but expressions of opinion, and, as such, not conclusive if supported by testimony, as provided in Section 5 of the Federal Trade Commission Act.

(4) The Circuit Court of Appeals erred in holding in effect that the findings of the Commission that "Marmola" was not a scientific or safe method for the treatment of obesity or the removal of excess flesh were not supported by testimony, and were, therefore, not conclusive upon review by the Circuit Court of Appeals, as provided in Section 5 of the Federal Trade Commission Act.

Respondent's brief in opposition to the petition for writ of certiorari (pp. 12–16) contended that the only question decided by the Circuit Court of Appeals was that the Commission had no jurisdiction. Since the order of this Court allowing certiorari limited the briefs and argument to the question of the jurisdiction of the Federal Trade Commission (R. 480), the Commission will urge the foregoing specifications of error only from the standpoint of the Commission's jurisdiction. The third and fourth specifications should perhaps be combined and rephrased as follows to bring out the

jurisdictional implications which the Commission will urge:

The Circuit Court of Appeals erred in holding that respondent's representations that "Marmola" was a safe and scientific remedy for obesity were expressions of opinion and, whether or not they are properly designated expressions of opinion, in holding that the Commission did not have jurisdiction under Section 5 of the Federal Trade Commission Act to proceed against such representations.

SUMMARY OF ARGUMENT

I. The court below erroneously adopted the view that the Commission's jurisdiction under Section 5 of the Federal Trade Commission Act is limited to those situations indicating a substantial tendency to restraint of trade or monopoly and to "palming off" cases. Such a construction does not accord with the words of the statute, has been rejected by this Court (*Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483), and is inconsistent with the purposes and intent of Congress as disclosed by the reports of the Committees dealing with this legislation.

The court below erroneously inferred that the dealers in obesity remedies with which respondent was in competition were "relatively disreputable" and not engaged in "legitimate activities." But the Commission had jurisdiction even if this inference was warranted. A proceeding to stop the sale of goods in interstate commerce by means of mis-

representation is "to the interest of the public" where the deception affects the health of the public rather than its pocketbook. And there is a public interest in stopping advertising which deceives a substantial number of those to whom it is directed although misrepresentation of a similar character is prevalent in the trade. *Federal Trade Commission* v. *Winsted Hosiery Co., supra.*

The requirements of Section 5 do not cease to apply because its enforcement may incidentally benefit private traders engaged in a trade which is in disrepute with the "best people." Such a limitation upon the scope of the section implies that a trade can, by the very inferiority of its commercial and ethical standards, acquire immunity from a law of general application. If it is generally desirable to maintain free and fair competition, it can not reasonably be supposed that Congress intended to leave competition unregulated where the trade was questionable, or intended that in such a trade competition in dishonesty be substituted for competition in efficiency.

Nor was the Commission deprived of jurisdiction because it was not affirmatively shown that respondent's competitors were guiltless of the same or of other forms of misrepresentation. If such a showing is essential to the Commission's jurisdiction, competition in dishonest methods can proceed unregulated in any trade where fraud and deception is general. If in every proceeding under

Section 5 it must be affirmatively shown that competitors have not been guilty of dishonest practices, the collateral issues thus raised will hopelessly confuse the primary issue.

II. The court below treated the question of the Commission's jurisdiction as dependent upon whether the words "safe" and "scientific" could be conclusively determined to be true or false as applied to respondent's remedy, and the court seems to have held that the Commission did not have jurisdiction because, if a sufficiently broad definition is adopted, they may be truthfully applied to respondent's remedy. We submit that the real issue is whether respondent's advertisements tended to mislead and deceive a substantial part of the purchasing public. The Commission found that they did have such a tendency.

Respondent advertised its remedy as safe, pleasant, and free from harmful consequences. Its unqualified statements were a representation that medical opinion was in agreement that the remedy could be safely taken, although this was a matter of sharp scientific and medical controversy. It represented the question of safety to be a fact when it was mere opinion.

Respondent also represented that its remedy had been perfected as the result of many years of scientific research. The undisputed evidence showed that this was untrue.

We submit that the court below erroneously treated the question as one of definition when the true issue was deception. And deception must be tested from the standpoint of the general public, including the gullible and ignorant, whose purchases respondent solicited.

ARGUMENT

I

THE COMMISSION HAD JURISDICTION TO REQUIRE RESPONDENT TO DESIST FROM MAKING FALSE REPRESENTATIONS, IN AID OF THE SALE OF ITS REMEDY, WHICH TEND TO DECEIVE THE PUBLIC AND WHICH ARE CALCULATED TO INJURE THE HEALTH OF PURCHASERS, EVEN IN THE ABSENCE OF A SHOWING THAT COMPETITORS' REMEDIES ARE SAFE AND ARE TRUTHFULLY ADVERTISED

The court below, after holding that the Commission had erroneously attempted to deal with representations of opinion, said (R. 477), "A broader question of the jurisdiction of the Commission underlies." The precise grounds upon which the court then proceeded to hold that the Commission lacked jurisdiction are not clearly stated, but the holding seems based in part on a preliminary inference (which we contend was wholly unjustified) that those who sold obesity remedies in competition with respondent were "relatively disreputable" and not engaged in "legitimate activities." (R. 479.) The holding may rest upon one or more of the following assumptions: (1) that the juris-

diction of the Commission under Section 5 is limited to "palming off" cases and to those situations indicating substantial tendency to restraint of trade or monopoly; (2) that a proceeding by the Commission where only "dishonest" competition exists is not "to the interest of the public"; (3) that Section 5 of the Federal Trade Commission Act can not be used to protect the trade of such competitors; (4) that a proceeding under Section 5 can be maintained only if it is affirmatively shown that the methods used by competitors are not likewise unfair.

The court said that it adopted the general view as to the foundation of the Commission's jurisdiction expressed in the partially dissenting opinion of Circuit Judge Denison in *L. B. Silver Co.* v. *Federal Trade Commission*, 289 Fed. 985, 992–1001. (R. 477–478.) The conclusion there reached was that Section 5 is limited to those situations indicating a substantial tendency to restraint of trade or monopoly and to "palming-off" cases. Cases of the latter type were regarded as covered by the section chiefly because of the decision of this Court in *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483, *supra*, which was explained (p. 1000) as "a typical case of 'palming off' of his goods by one dealer, not as those of another individual, but as those of another class."

We submit that this interpretation is not supported by the words of the statute, the construction

placed upon it by this Court, or its legislative history.

The statute gives the Commission jurisdiction over "unfair methods of competition in commerce * * * if * * * a proceeding by it in respect thereof would be to the interest of the public" (p. 41, *infra*).

The words "unfair methods of competition" are not apt to designate simply restraints of trade and monopolies condemned by the Sherman Act. Certain decisions involving the Sherman Act used the words "unfair competition," but this does not suggest that these words when used in the Federal Trade Commission Act, which differs radically from the Sherman Act in scope, purpose, and method of enforcement, apply only to situations falling within the purview of the Sherman Act.

Nor do the words of the Act suggest that it applies only to the cause of action judicially known as unfair competition. The Act prohibits *unfair methods* of competition, not unfair competition. Both the House Bill and the Senate Bill covered only "unfair competition" and the words, "unfair methods of competition," were adopted in conference. (H. Rept. No. 1142, pp. 3, 12, 16, 63d Cong., 2d Sess.) The change indicates a purpose to avoid a construction which would limit jurisdiction to palming-off cases.

The opinion of this Court in the *Winsted* case nowhere suggests that the Commission's order in that case was sustained merely because of some

analogy between palming off goods as those of another class and palming off goods as those of a competitor. The failure to draw this analogy is important, since the construction of the Act urged by Judge Denison was before this Court in that case. The lower court (*Winsted Hosiery Co.* v. *Federal Trade Commission*, 272 Fed. 957) in holding that the petitioner had not used unfair methods of competition within the meaning of the Act, said (p. 960):

> There was no passing off of the petitioner's goods for those of another manufacturer. There was no combination in restraint of trade nor any attempt to establish a monopoly.

See also the summary of the Commission's brief in the official report of that case (258 U. S. 484).

Federal Trade Commission v. *Gratz*, 253 U. S. 421, also indicates that this Court regards Section 5 as embracing any method of competition characterized by deception or fraud. In discussing the scope of the words, "unfair methods of competition," this Court there said (p. 427):

> They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, * * *.

To the same effect, see *Federal Trade Commission* v. *Sinclair Refining Co.*, 261 U. S. 463, 475.

Even if the *Winsted* case is to be explained as a palming-off case, the present case can be equally

so explained. We fail to see the essential difference between selling nonwoolen goods as woolen and selling an unsafe and unscientific remedy as a safe and scientific remedy. In each case goods are sold as something other than what they are.

In order to give the Act a broad and flexible application, Congress, instead of declaring certain specific practices unlawful, made all unfair methods of competition unlawful. If the Court is to resort to the legislative history of the Act in aid of its construction, the reports of the committees dealing with this legislation show that the words "unfair methods of competition" were not to be rigidly limited to particular types of unfair competition. The House Conference Committee reported (H. Rep. No. 1142, p. 19, 63rd Cong., 2d Sess.):

> It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition it would undertake an endless task.

The Senate Committee reported (Sen. Rep. No. 597, p. 13, 63d Cong., 2d Sess.):

> The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it

> would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be the better, for the reason, as stated by one of the representatives of the Illinois Manufacturers' Association, that there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.

The court below, in addition to construing Section 5 as applicable only to situations involving restraints or monopolies and to palming off cases, seemed to rest its jurisdictional holding in part on the inference that respondent's competitors were relatively disreputable. We submit that this inference was wholly unjustified. In the proceedings before the Commission it was shown that other obesity remedies were being sold in interstate commerce. (See pp. 13–14, *supra*.) No evidence was offered* or received as to the nature of these other remedies or as to the character of the representations made in advertising them, and certainly the courts can not take judicial notice that all obesity remedies are ineffective or sold by means of misleading representations. The court below said that the record showed, "without dispute or by implication which would hardly be denied," that the American Medi-

*The examiner excluded as improper cross-examination an inquiry whether the American Medical Association regarded any of these competitive remedies as "ethical." (R. 133–134.)

cal Association is engaged in a campaign against those proprietary remedies which it believes ought to be used by the public either not at all or only under supervision, and that the Federal Trade Commission and various "better business bureaus" have cooperated in attempting to stop objectionable advertisements of these remedies.[4] (R. 478–479.) But even if some proprietary medicines and some of their advertising matter is condemned by the American Medical Association, this does not warrant the inference that all of the twenty or more competitive obesity remedies disclosed by the record (R. 66, 111, 184), and the advertisements thereof, are "relatively disreputable."

But even assuming the inference to be justified, the more important issue is whether the Commission had jurisdiction under these circumstances. Section 5 of the Federal Trade Commission Act authorizes the Commission to issue a complaint whenever it has reason to believe that a person is using "any unfair method of competition in interstate commerce and if it shall appear to the commission that a proceeding by it in respect thereof

[4] The foregoing statements are based solely upon the allegations of respondent's answer in the Circuit Court of Appeals to the Commission's cross bill to enforce its order, which answer was not a part of the proceedings before the Commission and should not have been considered by the lower court in passing upon the Commission's jurisdiction. Section 5 of the Federal Trade Commission Act (*infra*, pp. 41–44) provides for a review of an order of the Commission thereunder upon the record of the proceedings before the Commission.

would be to the interest of the public." (*Infra*, p. 41.) We submit that the public interest is as deeply involved in misrepresentations which affect the health of the public as in those that affect its pocketbook. The Food and Drugs Act, c. 3915, 34 Stat. 768 (U. S. C., Title 21, Secs. 1–5, 7–15), is a legislative recognition that it is a matter of public concern to prevent the circulation of any article calculated to injure the health of the purchasing public. Cf. *Federal Trade Commission* v. *Kay*, 35 F. (2d) 160 (C. C. A. 7th), certiorari denied, 281 U. S. 764.

Nor is the public interest in preventing deception any the less great because the person against whom the Commission proceeds is engaged in a trade in which misrepresentation is rife, which was the situation that the lower court seemed to assume existed in the field of proprietary medicines. *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483, *supra*, indicates that a proceeding by the Commission under Section 5 to stop advertising which deceives a substantial part of the purchasing public is in the public interest, although the deceptive practice against which the Commission's order was directed was widespread in the trade. In that case this Court sustained an order of the Commission directed against use of the labels "Merino," "Wool," and "Worsted" on articles not made wholly of wool, notwithstanding the fact, to which the Court adverted (p. 492), that labels such as the Winsted Company employed, and particularly

those bearing the word "Merino," had long been established in the trade and were generally understood by it as indicating goods partly of cotton.

Section 5 is not primarily for the benefit of the individual trader. If he has been injured by unfair competition, he has his private remedy. The public interest in maintaining free and clean competition is the primary concern of the law. As this Court said in *Federal Trade Commission* v. *Klesner*, 280 U. S. 19, 27–28, *supra:*

> But to justify the Commission in filing a complaint under § 5, the purpose must be protection of the public. The protection thereby afforded to private persons is the incident. Public interest may exist although the practice deemed unfair does not violate any private right. In *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441, a practice was suppressed as being against public policy, although no private right either of a trader or of a purchaser appears to have been invaded. In *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483, an unfair practice was suppressed because it affected injuriously a substantial part of the purchasing public, although the method employed did not involve invasion of the private right of any trader competed against.

If there is competition, if advertising is (as must be conceded) a method of competition, and if the methods of competition are unfair because goods are sold by means of false representations,

it is immaterial that the only competitors are those engaged in a trade which is in disrepute with the "best people." The Act does not cease to apply whenever its application will incidentally benefit private traders who are engaged in a trade of which many disapprove. The court below appears to have adopted the view that the unworthiness of a trade exempts those engaged in it from the requirements of the Act. Such a conception implies that a trade can, by the very inferiority of its standards, acquire immunity from laws of general application. So long as no law is enacted to the contrary, proprietary medicines generally, and obesity treatments specifically, no matter how disreputable, will continue to be sold, and that portion of the public that is most easily misled by deceptive advertising will continue to buy them.

If the Commission's jurisdiction is dependent upon the ethics of competitors, the Act is subject to the limitations of the law of unfair competition, a construction expressly repudiated in *Federal Trade Commission* v. *Klesner*, 280 U. S. 19, 27. It is immaterial that respondent's competitors could not maintain a private action because they would not come into equity with clean hands.

There remains a narrower question of jurisdiction than the court below seemed to decide. If the proceeding is in the public interest and if misrepresentation has been used in selling goods in competition with the goods of others, is the Commission nevertheless without jurisdiction unless it is

affirmatively established that competitors are guiltless of the same or of other forms of misrepresentation? If the Commission is without jurisdiction in such a situation, the practical effect will be to exclude from the scope of the Act any trade where deception is prevalent and where, consequently, public interest in the enforcement of the Act is greatest.

In *Federal Trade Commission* v. *Winsted Hosiery Co., supra*, this Court said (pp. 493–494):

> For when misbranded goods attract customers by means of the fraud which they perpetrate, trade is diverted from the producer of truthfully marked goods. That these honest manufacturers might protect their trade by also resorting to deceptive labels is no defense to this proceeding brought against the Winsted Company in the public interest.
>
> The fact that misrepresentation and misdescription have become so common in the knit-underwear trade that most dealers no longer accept labels at their face value does not prevent their use being an unfair method of competition. A method inherently unfair does not cease to be so because those competed against have become aware of the wrongful practice.

We submit that the "honesty" of competitors is not a material issue in a proceeding by the Commission under Section 5 and that lack of proof of such honesty does not deprive the Commission of jurisdiction. The purpose of the antitrust laws, to

which the Federal Trade Commission Act is closely related, is to obtain for the public, through fair and free competition, the utmost of quality and service at the lowest price. If competition is to be unregulated in any trade where fraud and deception is general, competition in dishonesty will be substituted for competition in efficiency. In *Federal Trade Commission* v. *Sinclair Refining Co.*, 261 U. S. 463, 476, *supra*, the Court, referring to the Clayton Act and the Federal Trade Commission Act, said:

> The great purpose of both statutes was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain.

If the honesty of the methods used by competitors is a proper issue and affirmative proof thereof is essential to the jurisdiction of the Commission, the main issue in the proceeding will be befogged by a host of collateral issues. Approximately 300 pages of the record in this case are devoted to testimony taken on the question of whether or not respondent's representations were misleading. Equally extensive testimony might be introduced upon a like issue as to each of respondent's competitors.

It can not be assumed that every vendor of an obesity remedy referred to in the testimony advertised its product as scientific or that all of their remedies were unsafe. If the honesty of the meth-

ods of competitors is a material issue, then the degree of honesty would also seem material. In *Hills Bros.* v. *Federal Trade Commission*, 9 F. (2d) 481, 484–485 (C. C. A., 9th), the court in reviewing a proceeding by the Commission under Section 5 said:

> The petitioner also offered to prove that a concern in Los Angeles was selling coffee, and that publishers throughout the country were selling magazines, at fixed prices in other states, under agreements to maintain these prices, and refused to sell to dealers who would not maintain the prices agreed upon. An objection to this class of testimony was sustained, and the ruling is assigned as error. If the concerns in question did nothing more than the petitioner has done, according to its own contention, they did not violate the law, nor has the petitioner violated the law, for reasons hereinafter stated. If, on the other hand, the petitioner has violated the law, it would avail nothing to prove that others were equally guilty. Proof of the methods employed by others would be of little avail in any event, unless the methods employed were similar, and in order to determine the similarity of methods the commission would be compelled to hear and try many cases, instead of only one. There was no error in the rulings complained of.

In *Butterick Co.* v. *Federal Trade Commission*, 4 F. (2d) 910, 912 (C. C. A. 2d), the court, in re-

viewing a proceeding by the Commission under Section 5 of the Federal Trade Commission Act and Section 3 of the Clayton Act, said:

> The argument that other competitors are doing substantially what the petitioners do has no effect. It is not important.

See to the same effect, *Chamber of Commerce* v. *Federal Trade Commission*, 13 F. (2d) 673, 686 (C. C. A. 8th).

Even if one against whom the Commission has issued a complaint charging unfair methods of competition may introduce evidence that his competitors are also dishonest (which we do not concede), it does not follow that the Commission lost jurisdiction in this case by failing to show affirmatively that the methods used by respondent's competitors were fair and honest. In *International Shoe Company* v. *Federal Trade Commission*, 280 U. S. 291, 302, this Court referred to "the familiar presumption of rightfulness which attaches to human conduct in general."

It may be urged finally that the Commission should not deal with commerce in articles which fall within the scope of the Food and Drugs Act. Such a contention goes to the discretion, hardly to the jurisdiction, of the Commission. Furthermore, the proceeding in the present case is directed against misleading advertising, and that Act applies to false and fraudulent statements regarding the curative or therapeutic effect of drugs only when these

appear on, or are contained in, the package or label (c. 3915, 34 Stat. 771; c. 352, 37 Stat. 416; U. S. C., Title 21, Sec. 10). In any case where a drug is misrepresented by advertising not physically connected with the package or label, the intervention of the Commission is clearly warranted. *Henderson, Federal Trade Commission*, p. 232.

II

RESPONDENT'S REPRESENTATIONS AS TO THE CHARACTER OF ITS PRODUCT TENDED TO MISLEAD A SUBSTANTIAL PART OF THE PURCHASING PUBLIC AND THEREFORE CONSTITUTED AN UNFAIR METHOD OF COMPETITION OVER WHICH THE COMMISSION HAD JURISDICTION

The court below said that the Commission's cease and desist order contained six specific prohibitions against advertising, which, "taken together, reduce to two." (R. 471.) The court thereupon treated the question of the Commission's jurisdiction as dependent upon whether the words "safe" and "scientific," as applied to respondent's remedy, could be conclusively determined to be true or false "as disputed facts are decided." (R. 473–474.)

We submit that the court below misconceived the issue. The issue was whether respondent's advertisements tended to mislead and deceive a substantial part of the purchasing public and whether any part of the Commission's order was properly phrased to terminate such deception. The issue was not whether the words "safe" and "scientific" may be variously interpreted or whether they are ca-

pable of being understood in a sense in which they are true as applied to respondent's remedy.

The Commission found, and respondent took no exception to the finding (*supra*, pp. 5–6), that respondent advertised that the medical properties of Marmola are "safe" and "pleasant" and that it may be used "without discomfort, inconvenience, or danger of harmful results to the physical health of the users." (R. 23.) The Commission ordered respondent to cease and desist from making these representations. (R. 26–27.) It is now urged that the Commission had no jurisdiction to deal with these representations, not on the ground that its remedy is in fact safe, but on the ground that the safety of using any patent medicine can be only relative and that the safety of the remedy is the subject of scientific controversy. But respondent's unconditional representation that Marmola was safe and harmless implied that its safety was a matter upon which medical opinion was in agreement. Since in fact there was no such agreement, respondent's representation that Marmola could be safely taken was plainly misleading.

The character of respondent's representations is very different from the ordinary "puffing" of a seller. A representation that a given product offers "the greatest value for the least money" in its field is generally understood as an expression of opinion, which, if it deceives at all, could not ordinarily be condemned as an unfair method of com-

petition. But respondent represented as established fact what was, at best, mere opinion.

Whether respondent's advertisements were or were not misleading may be tested by comparing their effect on a prospective purchaser with the effect on such a purchaser if respondent advertised that many medical experts believe that Marmola can be safely taken without first consulting a physician, but that numerous other medical experts consider it highly dangerous to take Marmola without medical advice. An advertisement so phrased would truthfully present the situation disclosed by the record in this case after giving full effect to the testimony of respondent's witnesses.

The court below, in suggesting that respondent could properly advertise Marmola as safe, said (R. 475):

> * * * the results produced by too much thyroid are those which are generally called nervousness, including overtension, loss of sleep, etc. Whenever these unusual conditions develop, the directions are to stop the treatment and consult a physician.

The "directions" to which the court referred are contained in the booklet enclosed in each box of Marmola, but this booklet does not warn purchasers to stop taking Marmola when such symptoms occur. The only warning of any kind is the following sentence in the second paragraph under the heading "ORDER FROM DRUGGIST" (R. 422):

> Consult your own physician if you want special advice in any unusual condition.

The above sentence is buried in a booklet (R. 417–424) the whole tenor of which is to dispel any doubt as to the safeness and efficacy of respondent's remedy. Thus, under the heading "DIRECTIONS," the booklet reads (R. 418):

> Take one Marmola tablet after each meal and one at bedtime—four a day. Do this regularly. Try not to miss a dose, for the cumulative effects are important.
>
> * * * * *
>
> Do not permit interruption until the results are complete. * * *

The following appears under the heading "HAVE CONFIDENCE" (R. 420):

> Confidence should be based on the fact that Marmola contains the leading internal factor in fat reduction known to modern science. That factor is recognized the world over. No modern physician can dispute it. You have probably read articles by physicians in magazines, stating how an active thyroid affects fat.
>
> You should also have confidence because Marmola is prepared in a world-famous laboratory. The doctors and scientists in that laboratory are among America's leaders in gland therapy. They have devoted decades to its study.

Under the heading "WHEN TO STOP" nothing is said about consulting a physician or about the pos-

sibility of unusual conditions developing, but purchasers are advised to stop Marmola when normal weight has been attained or "when you are satisfied." (R. 421.)

The court unduly simplified the case when it referred only to the words "safe" and "scientific." These words are merely a convenient summary of respondent's varied representations. A few of those in which Marmola was held out as being scientific, or the result of scientific research or made from a scientific formula are collected in a footnote.[5] Some of them seem patently false, as that a "famous medical laboratory perfected" Marmola.

To test the capacity of respondent's representations to deceive we may compare the impression which they give—that Marmola has been perfected as the result of many years of scientific research by

---

[5] It [Marmola] reduces fat by correcting the gland cause, without abnormal exercise or diet. It is the modern, scientific way. Com. Ex. 6, No. b.

You should know this method based on scientific research. Com. Ex. 7, No. a.

They [Marmola tablets] are based on scientific research, and act to correct the cause. Com. Ex. 7, No. e.

Then a great medical laboratory perfected a tablet based on this principle. Com. Ex. 9, No. 91.

Marmola is not a secret prescription. The complete formula appears in every box. Also an explanation of results which so delight its users. Com. Ex. 9, No. 91.

A great medical laboratory, years ago, embodied this new method in Marmola prescription tablets. Com. Ex. 9, No. 89.

They are based on scientific research on the causes of excess fat. A famous medical laboratory perfected them. Com. Ex. 9, No. 83.

a great medical laboratory—with the true facts—that Marmola has been sold for over twenty years without substantial change in the formula except to decrease the quantity of thyroid; that respondent and its predecessor company were organized to sell Marmola; that the formula was acquired from the company which then made Marmola; that the present owner of respondent, who helped organize respondent's predecessor, does not remember whether he ever knew the doctor who evolved the formula for Marmola; that this present owner is absolutely lacking in any medical or scientific knowledge or training. (*Supra*, pp. 7–9.)

Whether respondent's statements tend to mislead and deceive must be tested from the standpoint of those to whom they are directed, certainly not the least gullible and ignorant. In *Procter & Gamble Co.* v. *Federal Trade Commission*, 11 F. (2d) 47 (C. C. A. 6th), the court, in reviewing an order of the Commission under Section 5 directed against use of the word "naphtha" in the brand name of a soap containing only kerosene, said (p. 48):

> We do not think it important whether kerosene is, or is not, naphtha in a scientific or legal sense. The question is whether the consuming public recognizes a distinction between the two, and believes and understands that a soap containing naphtha is a better cleansing agency than a soap containing kerosene.

In a case of unfair competition the court in *Florence Mfg. Co.* v. *J. C. Dowd & Co.*, 178 Fed. 73, 75 (C. C. A., 2d), said:

> The law is not made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearances and general impressions.

This Court in *United States* v. *95 Barrels of Vinegar*, 265 U. S. 438, in holding that vinegar was misbranded under the Food and Drugs Act, said (pp. 443):

> Deception may result from the use of statements not technically false or which may be literally true. The aim of the statute is to prevent that resulting from indirection and ambiguity, as well as from statements which are false. It is not difficult to choose statements, designs and devices which will not deceive. Those which are ambiguous and liable to mislead should be read favorably to the accomplishment of the purpose of the act.

Since this Court is reviewing only the question of the Commission's jurisdiction, we have not attempted to show that there is sufficient evidence to support the findings of the Commission, but only to show that the nature of respondent's representations are such, in the light of the evidence, as to fall within the jurisdiction of the Commission under Section 5.

CONCLUSION

We submit that the decree of the Circuit Court of Appeals should be reversed and the case remanded to that court for further proceedings.

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APRIL, 1931.

APPENDIX.

Section 5 of the Federal Trade Commission Act, c. 311, 38 Stat. 717, 719 (U. S. Code, Title 15, Sec. 45), provides, *inter alia:*

> That unfair methods of competition in commerce are hereby declared unlawful.
>
> The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.
>
> Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person,

partnership, or corporation may make application, and upon good cause shown may be allowed by the commission, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission. If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause

notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. The findings of the commission as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of

appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission shall be exclusive.

* * * * *

FILE COPY

No. 484

OCT 28 1930
CHARLES ELMORE CRO
CLER

Supreme Court of the United States

OCTOBER TERM, 1930

FEDERAL TRADE COMMISSION, PETITIONER,

v.

RALADAM COMPANY, RESPONDENT

On petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Brief of Respondent in Opposition to Petition for Certiorari.

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Supreme Court of the United States

OCTOBER TERM, 1930

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FEDERAL TRADE COMMISSION, PETITIONER,

v.

RALADAM COMPANY, RESPONDENT

Brief of Respondent in Opposition to Petition for Certiorari.

OPINION BELOW

The opinion of the lower court (R.541-550)—the United States Circuit Court of Appeals for the Sixth Circuit—is reported in 42 Fed. (2d) 430.

STATEMENT.

Respondent labeled its product, "recommended as a treatment for the reduction of excessive fat" (R.9),—as appears from the labels on the boxes which, with their contents, constitute Commissioner's Exhibits 2 and 3

(R.42-44).* Such "treatment" consisted of respondent's Marmola tablets; and of a booklet of instructions and advice as to the self-administration of such tablets, which was inserted inside, and supplied with, each retail package of respondent's tablets (R.43). The ingredients of which respondent's tablets were composed, are shown in the record (R.9, 471; Comm. Ex. 4, R. 48; and p. 20 of the booklets in Comm. Exs. 2 and 3, R. 43). The booklet which respondent was regularly supplying with each retail package of its tablets on November 16, 1929 (R. 408),—when respondent filed its answer (R.411-507) to petitioner's crossbill (R.401-407),—is also shown in the record (R.465-475); but such booklet is in some respects different in its contents (R.412-413)—although not markedly so—from the booklet contained in Comm. Exs. 1 and 2 (R.42-44), which respondent was regularly supplying to its patrons at the time of the proceeding before the petitioner.

Respondent advertised its anti-fat treatment widely, in magazines and newspapers (R.60-61). The character of the advertisements published by respondent, at the time of the proceeding before petitioner, is shown by Comm. Exs. 6, 7, and 8 (R.65); Comm. Ex. 9, containing 107 ad-

*At the time of the preparation of this brief, it is understood—from information obtained from the Clerk of this court—that the exhibits, although a part of the record in this case, have not yet been certified to, or lodged in, this court. The exhibits were first introduced in evidence at the hearings that were held by petitioner's trial examiner, in the initial proceeding before petitioner (Comm's Ex. 1, R.32-33; Exs. 2, 3, R.42-44; Ex. 4, R.48; Ex. 5, R.63; Exs. 6, 7, 8, R.65; Ex. 9, containing 107 advertisements, R. 108; Exs. 10, 11, 12, R.109-110; Resp's Ex. 1, R.90-91). By stipulation, none of the exhibits introduced in the proceeding before petitioner, was printed in the record of the petitioner's proceeding that was filed in the lower court; instead, such exhibits were themselves certified to, and physically lodged in, the lower court (R.1-2). It is understood, from a statement by the Clerk of the lower court, that on August 29, 1930,—after petitioner's time for applying for a rehearing had expired, and after the lower court's mandate had been sent down to petitioner,—the exhibits were sent by the Clerk of the lower court to petitioner; and that they were not in the lower court when the record herein was certified, on September 17, 1930 (R.550).

vertisements (R.108); and Comm. Exs. 10, 11, and 12 (R. 109-110). In the absence of those exhibits, a notion of the general character of some of the advertisements that were being published by respondent at the time of the proceeding before petitioner, may be obtained from pages 476 to 486 of the record,—although the advertisements there reproduced, which were published by respondent only after the petitioner had issued its order to cease and desist, may differ in some respects from the advertisements published by respondent prior to that time (R.412-413). An examination of the booklet above mentioned will also serve to indicate, in a general way, the character of the statements made by respondent in its advertisements; no one advertisement—and probably not all of the advertisements together—contained all of the statements found in such booklet; but it is believed that no advertisement made any representation not contained in such booklet.

Respondent's advertisements were probably susceptible of being fairly construed as containing a representation to the general effect that respondent's anti-fat treatment was scientific; and as implying a representation that such treatment could be safely self-administered—a representation, that is, that respondent's tablets could be safely self-administered, in accordance with the instructions and advice contained in the booklet that was supplied with each retail package of the tablets. Such booklet stated that the treatment was for the "average person" (R.472), with an "average case" (R.466, 471) of excessive fatness, and read, "Consult your own physician if you want special advice in any unusual condition" (R.472).

Each of respondent's tablets contained one-half grain of desiccated thyroid (R.471), which was the active fat-reducing ingredient in the tablets. Because of the desic-

cated thyroid content of the tablets, petitioner charged (R.2-6) that it was false and misleading (and constituted "using any unfair method of competition in commerce," in violation of the Federal Trade Commission Act) for respondent to advertise that its anti-fat treatment was scientific and could be safely self-administered. That, respondent denied (R.7-19).

The testimony on the issue thus raised was all medical testimony and was supplied exclusively by eleven physicians, of whom five testified favorably to petitioner's contentions, and six favorably to respondent's.

The physicians who testified gave only opinion evidence,—as an inspection of the record will show. Petitioner, in examining its witnesses as to whether respondent's anti-fat treatment was scientific and could be safely self-administered, in effect recognized that such questions were questions of opinion; in instances, the interrogatories that petitioner propounded to its witnesses were so phrased as, in terms, to put the questions in issue to its witnesses, frankly and candidly, as questions of opinion and not questions of fact at all (*ex. gr.*, as to "scientific"; R.86, 190; and as to "safe", R.84, 115-116, 187, 220).

The physicians whom petitioner called as witnesses, all testified that it could not properly be said that respondent's anti-fat treatment was either scientific or safe. The physicians whom respondent called, all testified to the contrary; they testified that it could properly be said both that respondent's anti-fat treatment was scientific, and also that it could be safely self-administered,—and they told why they thought so (R.244, 246-247, 249, 251, 267, 276, 281, 306, 307, 313-314, 347 as to "scientific"; and R.249, 251, 257, 276, 280, 297, 304, 305, 306, 313, 319, 326, 328, 333, 336, 352, 363-364, as to "safe").

As to the nature, properties, and effects of desiccated thyroid, the physicians were equally unable to agree. Thus, to illustrate, one physician rashly testified that thyroid is "more powerful" than strychnine (R.174, 200); but he afterwards recanted, and limited himself to the statement that thyroxin—the active principle of thyroid, for the obtaining of a very small quantity of which it is necessary to use a number of tons of thyroid (R.202)—is more powerful than strychnine (R.201); another testified that thyroid is not comparable to strychnine in any way, and he told why that is true (R.298-299, 304); and another supplemented that testimony by saying that there were a few men fifteen or twenty years ago who felt quite a "phobia" about thyroid (R. 328), but that the profession generally had "gotten over our awe about thyroid" (R.327); while even petitioner's witnesses admitted that thyroid operates to reduce excessive fat in the same manner,—by an oxidizing process, increasing metabolism,—as does exercise (R.201-202, 151-152, 153, 80, 94), and when taken in excess, produces only the same symptoms which attend excessive exercise (R. 97-98, 100), and leaves no permanent ill effects, even when taken in excessive doses,—the symptoms following an over-administration of thyroid all disappearing soon, if the taking of the thyroid be discontinued (R.100, 104). Again, one of petitioner's witnesses testified that a case of incipient goiter might be flared up by the administration of too much thyroid (R.118), while another of petitioner's witnesses testified just to the contrary (R. 74-75). Again petitioner's physicians considered that before taking thyroid, a patient should be subjected to a test as to his "basal metabolism" (R. 141), and should be kept under "metabolic control" (R. 86) while taking it, and that his metabolism could be measured "accurately" by a machine (R.81); the other physicians considered that machines for measuring metabolism, unless expertly

used under perfect control, were not dependable as to their measurements (R.241, 255, 273-274, 283, 301-302, 353), and that, although the administration of thyroid became commonplace between 1896 and 1900, such machines did not come into use at all until 1918 or 1920, and, even now, can be found only in large centers of population (R. 241). Again, petitioner's physicians testified, in substance, that nobody should take thyroid except under direct medical surveillance; the physicians who testified for respondent disagreed with that view,—and one of them testified that he had let two of his patients, each of whom was taking two grains of thyroid a day, go from Chicago to Florida, and continue taking the thyroid, while in Florida, wholly free from medical supervision, and without other instructions than to discontinue taking the thyroid if certain symptoms, which he described to them, should appear (R.258, 265-266).

The above is merely illustrative—and not by any means exhaustive—of the divergences in the expert testimony. The record is replete to overflowing with contradictory statements and views on the part of the respective physicians, similar to those above noted. The petitioner's trial examiner—who was the only person connected with petitioner that saw the witnesses and heard them testify (R. 519)—came to the conclusion, and so reported to the petitioner, in substance (R.534-537), that all of the physicians who testified were of good professional standing and good credibility; and that having regard for the contradictions in their statements and the divergences in their views, the determination of the "scientific dispute"—involved in the question whether respondent's representations in its advertisements, to the effect that its anti-fat treatment was scientific and could be safely self-administered, were false—could not be "safely or justly predicated upon the evidence contained in this record."

Such report of the trial examiner is quoted, in part, in a footnote of the lower court's opinion (R. 543).

Petitioner, however, saw fit—notwithstanding that it had not seen any of the witnesses, or heard them testify—to disregard altogether its trial examiner's view as to the credibility of the witnesses and the weight properly to be accorded to the radically contradictory testimony; and, basing its action exclusively upon the testimony as it appeared in typewriting, petitioner proceeded to make the findings and conclusions that are shown in the record (R.21-25),—thereby wholly disregarding the testimony of respondent's witnesses, arbitrarily and capriciously and without assigning any reason for so doing (R.520-522).

At the same time, petitioner issued its order to cease and desist (R.26-27), which is accurately summarized in the lower court's opinion, thus (R. 543):

> "The Commission's order to desist and refrain contains six specific prohibitions against advertising. Taken together, they reduce to two; they forbid the representation that Marmola is a scientific remedy for obesity; and, thereupon, they forbid advertising Marmola as a remedy for obesity unless the statement is added that it is not safe to be taken except under the supervision of a competent physician" (R.543).

The first ground upon which the lower court condemned such order, was that it forbade the publication of what were essentially mere expressions of opinion, and not representations of facts at all; and that the statute had not made petitioner an arbiter of opinions, or given petitioner any power to do anything more than to prevent the publication in advertisements of false representations of facts.

The lower court condemned petitioner's order to cease and desist upon a further ground, also.

Such order, it will be observed, directed respondent, in substance, either not to advertise its Marmola tablets at all; or, if respondent should advertise them, to insert in its advertisements an explicit statement to the specific effect that no purchaser could safely take such tablets unless he should first employ a competent physician, and should take them under such physician's supervision. Under such order, respondent could not advertise its tablets, even if it should insert in its advertisements advice that the person taking them should adopt every one of the precautions which the petitioner's physicians advocated, including the precaution of having his basic metabolic rate measured, in advance and at frequent intervals, by a machine, and every other precaution; respondent could do nothing except to advise a purchaser of its tablets to employ a physician. In effect, and doubtless in intent and purpose, such order was substantially a command to respondent to cease doing business altogether.

In its "Conclusions," upon which, in part, it based its order to cease and desist, petitioner said that respondent's advertising that its anti-fat treatment was scientific and could be safely self-administered, was "to the prejudice of the public and respondent's competitors" (R.25). And thereby petitioner gave it to be understood, inferentially, that the issuance of its order was, in the words of the statute, "to the interest of the public". That, the lower court, in effect, denied; it said, in effect, that the issuance of the order had not been prompted by any desire or purpose on petitioner's part to protect, and would not operate to protect, any "interest of the public", the protection of which had been committed by the statute to petitioner,—the lower court taking the view that petitioner had not been constituted the general guardian of the public welfare, which petitioner appeared to regard itself, and had not been empowered to protect the public from any and every evil that petitioner might

consider that it was generally "to the interest of the public" to uproot and destroy, but only from the evil of undue restraint of trade and of competition in trade, arising out of the use of unfair methods of competition.

No member of the public appeared before petitioner to complain that he, or she, had been deceived by respondent's advertisements, or injured by its anti-fat treatment. Although it was proved that respondent's tablets had been sold for upwards of twenty years (R.38), no proof was adduced that anybody had ever been injured by taking them; and it was proved without contradiction that desiccated thyroid can be bought by anybody,—even a child,—at any drug store, without a prescription, the same as can calomel, or quinine, or laxative pills, or any other non-poisonous drug (Resp. Ex.1, R.91; R.237, 297, 326).

No competitor of respondent appeared before petitioner to complain that respondent's advertisements were false or misleading, or that they were injurious to such competitor or to any competitor of respondent, or to the general trade or business of selling anti-fat treatments. No competitor asked any protection against respondent's advertisements or advertising methods.

The role of complaining witness in the proceeding before petitioner, was occupied exclusively by the Director of the Bureau of Investigation of the American Medical Association (R.110-113, 130-134, 159-170). His testimony was such as to show that he was not concerned at all about the welfare of respondent's competitors in the trade of selling anti-fat treatments, or about the welfare of such trade itself, or about maintaining fair and free competition in such trade, but that he was concerned solely that such trade should be utterly destroyed, for the benefit, as he conceived, of the public health, and for

the financial advantage of members of the American Medical Association,—who, of course, in their legitimate activities as practitioners of medicine, are not engaged in commerce at all, and hence are not properly or lawfully objects of any official concern or action on the part of petitioner.

The record shows that during the time while petitioner's proceeding against respondent was pending before petitioner, the attitude of petitioner—as evidenced by statements made by its chairman, professing to speak in his official character—was that the trade of selling anti-fat treatments should be utterly destroyed; and that, in that behalf, the advertising of such treatments should be altogether prevented (R.420, 487-495; R.446-449). The record shows also (R.414-464, 487-507), that in an effort to prevent the advertising of, and so to destroy the trade in, anti-fat treatments and some other commodities (R.438-439, 446-449), petitioner, by its chairman, cajoled and intimidated the publishers of newspapers and magazines throughout the United States, into entering into what was in effect a conspiracy that such publishers would concertedly submit to a censorship of the publication of advertising matter, which should be, and was in fact, exercised by petitioner and certain organizations throughout the country known as Better Business Bureaus, acting cooperatively as censors; and that such publishers would, at the instance of petitioner and such Better Business Bureaus, concertedly boycott, and decline to render advertising service to, persons engaged in the trade of selling anti-fat treatments, and in the other trades that were proscribed by petitioner (R.414-464, 487-507). The record shows also (R.414-464, 487-507), that even before petitioner had entered its order to cease and desist against respondent, and also afterwards,—while the question of the validity of such order was pend-

ing before the lower court,—petitioner was actively engaged, in cooperation with various Better Business Bureaus, in seeking to destroy (and, in truth, in largely destroying) petitioner's business, partly by and through exercising the powers of censorship and boycott which they had acquired through the above mentioned conspiracy of publishers; and partly, by and through browbeating and frightening publishers that were not participants in such conspiracy, into declining to publish advertisements of respondent's anti-fat treatment, by means of unlawful threats directed to such publishers, that if they should publish respondent's advertisements, petitioner would file complaints and institute proceedings, before itself, against such publishers (R.414-464, 487-507).

In that state of the record, the lower court interpreted petitioner's order to cease and desist, and reversed and set it aside (R.540), as being in excess, and an attempted perversion, of petitioner's lawful powers,—not such an order as it was "to the interest of the public" that petitioner should issue—for substantially these reasons: that petitioner's order was not intended, and would not operate, merely to prevent undue and unlawful restraint in the trade of selling anti-fat treatments, by preventing respondent from "using any unfair method of competition in commerce" by publishing false advertising, which the court considered was the limit of what it was competent for respondent to do in "the interest of the public"; that petitioner's order was intended, and would operate, to destroy petitioner's business and, if conceded to be sound and sustainable in principle, would enable petitioner, by issuing like orders against others engaged in the trade of selling anti-fat treatments, to destroy the whole of such trade; and that petitioner had not been created, and was not authorized to act, as an agency to destroy any trade,—under the guise and subterfuge of merely preventing, in the interest of the public, the use

in such trade of any unfair method of competition in commerce,—howsoever inimical to the public welfare petitioner might deem such trade, or such trade might in fact be.

SUMMARY OF ARGUMENT.

The lower court decided but one single question,—not two questions; and that, a question of petitioner's jurisdiction. The lower court denied petitioner's jurisdiction upon two grounds.

The first ground was that petitioner's power to prevent the publishing of false statements in advertisements (as amounting to "using any unfair method of competition in commerce", within the meaning of the statute) was limited, by the statute, to preventing the publication of false statements of *facts*, and *not* mere expressions of *opinion;* and that respondent's statements in its advertisements, which petitioner had assumed to interdict,—to the general effect that respondent's anti-fat treatment was scientific and could be safely self-administered,—were mere expressions of *opinion, not* statements of *facts*. In denying petitioner's jurisdiction upon such ground, the lower court did not go counter to any decision of this court, or of any Court of Appeals.

The second ground upon which the lower court denied petitioner's jurisdiction was, that petitioner's power to issue any order to cease and desist was limited, by the statute, upon the condition that the issuance of such order should be "to the interest of the public"; and that inasmuch as it appeared that petitioner had issued its order commanding respondent to cease and desist from publishing the advertisements in controversy, rather with a view to destroying the trade of selling anti-fat treatments, than with a view to merely preventing the undue restraint of such trade, by prohibiting the use of unfair

methods of competition therein, therefore the issuance of such order had not been "to the interest of the public."

There is no support in the record for petitioner's assertion that the lower court denied petitioner's jurisdiction, either (1) upon the ground that respondent's competitors were not "honest", in that they published false advertisements; or (2) upon the ground that no injury to any individual competitor of respondent had been affirmatively proved to have resulted from respondent's publication of the advertisements in controversy, and no injury to respondent's competitors, as a class, could be presumed to have resulted from such publication. The decisions cited by petitioner for the purpose of showing the impropriety of denying petitioner's jurisdiction upon either of such grounds, are accordingly wholly without bearing upon the case at bar, and the lower court's decision is not in any degree inconsistent with any of such decisions.

If the lower court be considered to have been right as to either one of the grounds, first above stated, upon which it rested its denial of petitioner's jurisdiction, there is no necessity for this court's inquiring whether it was right as to the other ground also. If the lower court was right as to either ground, its decision would have to be affirmed; and it was so clearly right as to the first of such grounds, as to render inquiry in respect of the second ground superfluous,—although it was clearly right as to the second ground, also.

If the lower court be considered to have been wrong as to both of the grounds upon which it rested its decision, still there is no necessity for this court's reviewing the lower court's decision; because it is clear from the record that petitioner's order would have to be set aside upon grounds which the lower court, in the view which it took of the case, found it unnecessary to pass

upon:—namely, the grounds (1) that petitioner's order is repugnant to the Fifth Amendment, (a) in that petitioner was violently and obsessionally prejudiced against respondent, and against its anti-fat treatment and all other anti-fat treatments, whereby petitioner could not, and did not, accord respondent a fair hearing, and (b) in that petitioner arbitrarily and capriciously declined to give effect to the testimony which respondent adduced before petitioner; and (2) that petitioner's order is repugnant to the First Amendment, in that it constitutes an unlawful abridgement of respondent's freedom of speech.

ARGUMENT.

I.

The lower court decided but one single question,—not two questions; and that a question of petitioner's jurisdiction.

One unfamiliar with the record, reading the petition and petitioner's brief, might possibly gain the impression that the lower court decided two questions: first, a question as to petitioner's jurisdiction; and second, a question as to whether respondent's representation that its anti-fat treatment was scientific and could be safely self-administered, was a representation as to matter of opinion or matter of fact,—and that such second question was quite unrelated to the first.

The nearest that the lower court approached to deciding two questions, was to hold, in effect, that there were two good grounds,—either of which was sufficient, by itself and quite independently of the other,—upon which to sustain a conclusion that petitioner had not had jurisdiction to issue its order to cease and desist (R.26-27), which the lower court reversed (R.540).

II.

Statement of the first ground upon which the lower court denied petitioner's jurisdiction.

The first ground upon which the lower court decided that petitioner lacked jurisdiction to enter its order to cease and desist against respondent, was that petitioner's jurisdiction in respect of forbidding the publication of false representations in advertisements, is limited to preventing the publication of false representations of facts; and that respondent's representations, in its published advertisements, that its anti-fat treatment was scientific and could be safely self-administered, were representations of mere opinions, and not of facts.

The portion of the lower court's opinion in which it ruled against petitioner's jurisdiction upon such ground, extends from the eighth paragraph of such opinion,—beginning with the words, "The first question raised" (R.543),—to and including the eighteenth paragraph thereof,—ending with the words, "rests the finding of general danger" (R.547).

The premise of law upon which such portion of the lower court's opinion rests, although not explicitly stated therein, is found in the following provisions of Sec. 5 of the Federal Trade Commission Act,—which section authorizes the petitioner to institute a proceeding (and therein to make findings, and to base thereon an order to cease and desist) to prevent any person from *"using any unfair method of competition in commerce . . .* if it shall appear to the commission [petitioner] that a proceeding by it in respect thereof would be *to the interest of the public"*,—to wit (Petitioner's brief, pp.22, 23; U.S. Code, Tit. 15, Sec.45):

> "If . . . . . the commission shall be of the opinion that the method of competition in question is prohibited by

this Act, it shall..... state its findings as to the *facts*, and shall issue..... an order..... to cease and desist from using such method of competition..... The findings of the commission as to the *facts*, if supported by testimony, shall be conclusive..... The commission may modify its findings as to the *facts*, or make new findings,..... which, if supported by testimony, shall be conclusive" etc. (Our italics).

That statutory language shows that Congress never intended that petitioner should be an arbiter of *opinions*, or that petitioner should have jurisdiction—whether under the guise of preventing the use of any unfair method of competition in commerce, or otherwise—to issue any order commanding anybody to cease and desist from publishing any *opinion*, regardless of what petitioner's view might be as to the soundness or unsoundness—and, in that sense, the truth or falseness—of such *opinion*, or as to whether the suppression of such *opinion* would be to the interest of the public.

It is understood that petitioner does not contend that the lower court erred in disposing of the case at bar upon the premise that petitioner has no jurisdiction to prevent the publishing of opinions, howsoever unsound or dangerous petitioner may deem them to be. Petitioner is understood to confine its contention to asserting that, in reaching the conclusion that respondent's representations, in its published advertisements,—that its anti-fat treatment was scientific and could be safely self-administered,—were a mere expression of opinion and not representations of facts, the lower court thereby rendered a decision which is in conflict with a decision of this court, and with the decisions of certain Courts of Appeals. (Petition, p.6, par. "(3)"; pp.8-9, par. "3". Petitioner's brief, pp.17-19).

III.

The lower court's decision that petitioner lacked jurisdiction upon the first ground assigned by the lower court in that regard, is not in conflict with any other decision.

Petitioner is understood to assert that the decisions which are cited in the petition (p.9) and in petitioner's brief (p.18), hold, in effect, that a question of whether a medicinal preparation is scientific and can be safely self-administered, is a question of fact. Respondent respectfully denies that any such holding is to be found in those decisions.

In *Seven Cases v. United States* (1916) 239 U.S. 510,—the first of the cases cited by petitioner,—the manufacturer of "Eckman's Alterative" represented that such preparation was "For all throat and lung diseases, including . . . Tuberculosis (Consumption)", and said, "We know that it has and will cure Tuberculosis". The manufacturer admitted on the record, by demurrer, that there was no drug or substance that could be relied upon to cure tuberculosis. It was held that the manufacturer's representation that its preparation would cure tuberculosis, was false and fraudulent; and therefore that the manufacturer had been guilty of misbranding its preparation, within the provision of the Food and Drugs Act, which declared that any drug should be deemed to be *"misbranded"*, if the label on the package in which it was sold, or any circular enclosed inside such package, contained any statement "regarding the curative or therapeutic effect of such article . . . . . which is *false and fraudulent.*" The ground upon which such holding was based was not that the manufacturer's statement that its preparation would cure tuberculosis, was a representation of fact. The court recognized and conceded that such statement was an expression of mere opinion, so far as it related to the therapeutic effect of

Eckman's Alterative; and the court did not consider whether, from the standpoint of therapeutic science, the opinion embodied in such statement was sound or unsound, true or false,—except to note that the manufacturer had itself in effect admitted upon the record, by its demurrer, that such opinion was unsound, therapeutically considered. But the court held that the statement in question was a statement of fact, so far as it related to what was the manufacturer's real opinion, or belief, or state of mind, with reference to the therapeutic effect of Eckman's Alterative; and that, as a statement of the manufacturer's opinion, or belief, or state of mind, such statement was false, and that the manufacturer had been guilty of fraud in making it, because it had constituted a misrepresentation, knowingly and intentionally made, of a matter of fact, namely, the manufacturer's real state of mind,—a conclusion which was inescapable, in view of the fact that the manufacturer had admitted of record that there was no drug or substance that could be relied upon to cure tuberculosis, wherefrom it followed that it could not possibly have been the manufacturer's real opinion that its preparation would cure tuberculosis. The court said, in that connection, at pages 517-518:

> "It is said that the owner has the right to give his views regarding the effect of his drugs. But *state of mind* is itself a *fact*, and may be a material fact, and false and fraudulent representations may be made about it; and persons who make or deal in substances, or compositions, alleged to be curative, are in a position to have *superior knowledge* and may be held to *good faith* in their statements." (Our italics).

The two other cases that are cited by petitioner,—*Eleven Gross Packages etc. v. United States* (1916), 233 Fed 71 (C.C.A.3), which involved "Dr. Williams Pink

Pills"; and *Hall v. United States* (1920) 267 Fed. 795 (C.C.A.5), which involved "Texas Wonder. Hall's Great Discovery,"—arose under the same statute, and presented the same questions, as *Seven Cases v. United States* (239 U.S. 510) *supra*, and are indistinguishable from it in principle.

In neither of such cases did the court say, or suggest, that a statement of mere belief, as to the therapeutic effect of a medicinal preparation, was anything more or other than an expression of opinion, so far as it related to a question of therapeutics; in neither of them did the court undertake to find out or determine whether the opinion involved was sound or unsound, true or false, from the standpoint of therapeutic science; in each of them the court said, that—wholly apart from the question of whether the opinion in question was sound or unsound, true or false, when therapeutically considered—the person who had expressed such opinion had not really entertained the opinion he had expressed, and that therefore he had stated a falsehood, and committed fraud, when he had represented that he did entertain it, and that it was his opinion, when it was not.

All three of the cases cited by petitioner are but special applications of the familiar principle that every representation of matter of mere opinion is, in part, a representation of fact, in that it purports to disclose the representor's true state of mind,—a matter of fact; and that such representation constitutes actionable fraud, if the representor is in a position to have superior knowledge, so that his expression of opinion is likely to be relied upon and so to deceive, and if what he puts forth as his opinion is not actually his opinion, but misrepresents his real, true, state of mind. *James-Dickinson Co. v. Harry* (1927), 273 U.S. 119, 123-124; *Vulcan Metals Co. Inc. v. Simmons Mfg. Co.* (1918), 248 Fed. 853, 856-857, (C.C.A.2), *certiorari* denied, 247 U.S. 507; *Knicker-*

bocker Merchandising Co. v. United States (1926), 13 Fed. (2d) 544, 545-546, (C.C.A.2), *certiorari* denied, 273 U.S. 729; *Taylor v. Burr Printing Co.* (1928), 26 Fed. (2d) 331, 334, (C.C.A.2), *certiorari* denied, 278 U.S. 641; *Edgington v. Fitzmaurice* (1885), 29 C.D.459, C.A.; 53 L.T. (N.S.) 369, 376.

None of the three cases that are cited by petitioner touches, in the remotest degree, upon the question of whether respondent's representations that its anti-fat treatment was scientific and could be safely self-administered, are properly to be regarded as representations of mere opinions, or of facts. One of such cases (*Seven Cases v. United States*) was brought to the attention of the lower court, together with other cases which are not referred to in the petition for certiorari, or in the petitioner's brief in this court. The lower court, in its opinion,—after citing and briefly discussing such cases,—said: "We cannot see in these cases any particular bearing on the question here" (R.548),—meaning, upon the question of whether respondent's representations which were in controversy, were representations of mere opinions, or of facts.

Considered in their broader aspects,—as holding that a representation as to matter of mere opinion will constitute fraud, if the representor possesses superior knowledge and does not actually believe in the opinions which he expresses, but misrepresents his true state of mind,—the three cases that are cited by petitioner, are wholly without any possible application to, or bearing upon, the case at bar. It is not charged in the complaint herein (R.2-6) that respondent did not truly state its real opinion and belief, or that respondent misrepresented its true state of mind, or that respondent acted in bad faith in any way, when it published its representations that its anti-fat treatment was scientific and could be safely self-

administered. As was said by the lower court in its opinion (R.543-544):

> "There is, in the petition [complaint] filed by the Commission, no claim that the representations as to science and safety, were fraudulent and not made in good faith, or were so obviously and clearly unsound that they could not plausibly be held by any intelligent person. There being no issue as to fraud or bad faith, no proofs were taken on either side and such suggestions as are now made with that aspect must be disregarded" (R.543-544).

In no possible aspect of the matter, it is respectfully submitted, can it be reasonably concluded that there is any conflict between any of the three cases that are cited by petitioner, and the decision by the lower court that respondent's representations in its published advertisements, that its anti-fat treatment was scientific and could be safely self-administered, were representations of mere opinions and not of facts.

IV.

Statement of the second ground upon which the lower court denied petitioner's jurisdiction.

The second ground upon which the lower court decided that petitioner lacked jurisdiction to enter its order to cease and desist against respondent,—although not explicitly stated in the opinion,—was that it was not "to the interest of the public" that petitioner should have entered its order to cease and desist against respondent.

Such second ground is set forth in the four paragraphs of the opinion next preceding the last paragraph thereof (R. 548-550), beginning with the sentence, "A broader question of the jurisdiction of the Commission underlies" (R. 548); and ending with the sentence, "Again, it cannot be seriously contended that the machinery of the Com-

mission was intended to give governmental aid to the protection of this kind of trade and commerce" (R. 550).

The articulation of such portion of the lower court's opinion with the remainder of the record, is found in the following statement in the petitioner's "Conclusions" (R. 25),—which "Conclusions" are referred to in, and made a part of the basis of, petitioner's order to cease and desist (R. 26),—to wit (R. 25):

> "The practice of said respondent [meaning, the practice of the Raladam Company in publishing advertisements, which the Federal Trade Commission deemed false and misleading, to the effect that such company's anti-fat treatment was scientific and could be safely self-administered] under the conditions and circumstances described in the foregoing findings are [is] *to the prejudice of the public and respondent's competitors*", etc. [Our italics].

The ruling made by the lower court in the above identified portion of its opinion, amounted in substance, respondent respectfully submits, to this: that, under Sec. 5 of the Federal Trade Commission Act, petitioner had no power to issue an order to cease and desist against anybody's publishing false advertisements (and thereby *"using any unfair method of competition in commerce"*), unless the institution and prosecution of such proceeding would be *"to the interest of the public"*; and that, under the facts disclosed by the record in the case at bar, petitioner's issuing an order to cease and desist against respondent had not been *"to the interest of the public."*

Summarily stated, the considerations upon which the lower court appears to have rested such ruling, appear to have been substantially these: that petitioner had not been created for the purpose of providing an agency that should protect the public, by and through the instrumentality of an order to cease and desist, from any and every evil from which petitioner might conceive that it

was "to the interest of the public" that the public should be so protected; that petitioner had been created for the purpose of preventing such, and only such, injury to the public as might arise, or be threatened, by or through the undue restraint of legitimate trade (as a result of anybody's "using any unfair method of competition in commerce" in such trade), and that it was not "to the interest of the public" that petitioner should issue any order to cease and desist, except in order to prevent such undue restraint in such trade, as the primary purpose of such order; that petitioner had not been created to destroy any branch of trade, even though petitioner might consider—and, conceivably, might be right in considering—that such branch of trade was inimical to the public good; and that the only interpretation of which the record in the case at bar, and petitioner's order to cease and desist, were reasonably susceptible, was that petitioner had issued its order to cease and desist herein,—*not* for the purpose of freeing the trade in anti-fat treatments (for medically unsupervised self-administration) from any undue or unlawful restraint imposed by respondent's advertising, and *not* for the purpose of securing free competition in such trade, in order primarily thereby to benefit respondent's competitors, and, through benefiting them, to benefit the public,—but primarily and essentially for the purpose, and to the end, of altogether destroying respondent as a competing factor in the trade in such anti-fat treatments, by preventing respondent from advertising its anti-fat treatment, as one for medically unsupervised self-administration, at all; and that the entry of such order had not been "to the interest of the public," in the proper sense and meaning of those words as used in the statute, and hence that the entry of such order had been beyond petitioner's jurisdiction,—even on the assumption that trade in anti-fat treatments for unsupervised

self-administration was a public evil, and that petitioner's order to cease and desist would be effectual to destroy, or would go far towards destroying, such trade altogether.

In placing such interpretation upon the record, and upon respondent's order to cease and desist, the lower court appears to have taken into account the character of petitioner's order to cease and desist,—that it substantially forbade respondent from advertising its product as an anti-fat treatment for medically unsupervised self-administration, at all; the character of respondent's business of selling an anti-fat treatment for medically unsupervised self-administration,—that the "elimination" of such business might well be considered to "tend to the public good"; what petitioner's attitude appeared to be, in respect of considering itself as charged with the duty and power of protecting the public from evil generally, as disclosed by "this record, . . . other recent or pending cases in this court [the lower court] and other decisions of the Commission, and . . . *announcements by its members shown in this record*" (R.549),—the lower court apparently referring, by the italicized words, to what appears in the record herein, at pages 447-449, 487-495, 438-439, which should be read if the reasoning that underlies the lower court's decision is to be grasped in its full import; and the circumstance that it was inconceivable that petitioner could have issued its order to cease and desist for the purpose of benefiting, in any manner or degree, any of respondent's competitors, all of whose anti-fat treatments, the lower court said, were on the same *index expurgatorius* (compiled by the American Medical Association, R. 110-113, 130-134, 159-169, and apparently adopted by petitioner) with respondent's Marmola tablets, and were *"relatively disreputable"* (R.550).

V.

There is no support in the record for the contention that the lower court denied petitioner's jurisdiction upon the ground that respondent's competitors were not "honest",—in that they published false advertisements, or otherwise.

A writ of certiorari will not be granted except upon a ground that has a substantial basis in the record. *Mellon v. McKinley* (1927), 275 U. S. 492.

There is no support in the record, it is respectfully submitted, for petitioner's suggestion,—in its petition (p. 6, par. "(1)"; pp. 7-8), and in its brief (pp. 10-11, par. "1"; p. 12, in the caption; pp. 14-17),—that the lower court based its decision that petitioner lacked jurisdiction to enter its order to cease and desist against respondent, upon the ground that respondent's competitors in selling anti-fat treatments were not "*honest*", in that they made false representations, in their published advertisements, concerning the treatments that they respectively offered for sale; and that in basing its decision upon such supposed ground, the lower court went counter to the decisions of other Courts of Appeals.

It is respectfully submitted that there is not a word in the lower court's opinion,—or in the record,—in condemnation of respondent's competitors as not being "honest", or in condemnation of their published advertisements as being false. The advertisements of respondent's competitors are not even mentioned or referred to, in the whole course of the opinion. The condemnatory statements in the opinion are all leveled at the trade or business of selling anti-fat treatments; and at the commodities offered by respondent's competitors in such trade,—which are said to be on the same *index expurgatorius* with respondent's anti-fat treatment, and to be "*relatively disreputable.*" There is no condemnation in

the opinion directed at the persons who are engaged in such trade in competition with respondent, or at their honesty, or at their trade methods, or at their advertisements or advertising methods.

The only statements in the lower court's opinion that could conceivably be regarded as relevant in the present connection, are believed to be these:

> "The medical profession has always contended that auto-diagnosis, drug-store purchases, and self-medication are dangerous to the public health and ought to be suppressed or minimized. The *evil, at least in some degree,* is not to be denied . . . . . (R.541) . . . . Very likely every member of this court will personally fully agree with this professional opinion that such public self-medication is *unwise*. . . . . (R.546) . . . . . It must be evident that the trade which was to be protected against restraint (and unfair competition is a kind of restraint) was that *legitimate* trade which was entitled to hold its own in the trade field without embarrassment from unfair competition. (R.548) . . . . . It appears that these methods of influence [meaning, the methods of influence by which, as appears at pages 414-415, 420-461, 487-507 of the record, petitioner had brought about a concerted boycott of respondent by the publishers of various newspapers and magazines throughout the country, and a concerted refusal by such publishers to print any advertisement of respondent's anti-fat treatment] . . . . . have destroyed a large part of petitioner's business [meaning, the business of the Raladam Company, respondent in this court] through refusals to accept this advertisement, and only the injunction of this court is needed to make the elimination complete. We have no occasion to deny, nor indeed, reason to doubt, that *this elimination would tend to the public good* . . . . . (R.549) . . . . . When we search this record to find the *legitimate* activities which are to be protected . . . . . we find only two such possible beneficiaries. One is the medical profession [not engaged in commerce] . . . . . The other possible benefi-

> ciary is found in the list which the American Medical Association Bureau has made up [R.110-112, 130-134, 159-169] comprising a number of other commercially exploited remedies for obesity . . . . . Some of them [meaning, obviously, some of such other exploited remedies] are perhaps still being sold in substantial quantities, though that is left very vague. It is fairly to be inferred, not only that these [meaning, such of the other exploited remedies as were still being sold] are on the same *index expurgatorius* as Marmola [respondent's anti-fat treatment], but that they are *relatively disreputable.* Again it cannot be seriously contended that the machinery of the Commission was intended to give governmental aid to the protection of *this kind of trade and commerce"* (R.550). (Our italics throughout).

There is nothing in such language condemnatory of anything, except the trade or business of selling anti-fat treatments for medically unsupervised self-administration, and the commodities sold in such trade. There is no imputation or insinuation that respondent's competitors were not *"honest"*, in that they published false advertisements.

In such state of the record, there is no occasion to examine the cases that are cited at pages 14 to 17 of petitioner's brief; which are submitted by petitioner as holding, in substance, that it is no defense for a person who is being proceeded against for false advertising, to show that his competitors are guilty of false advertising. The case at bar not having been decided upon any such ground, those cases are plainly wholly irrelevant upon the question before this court.

What is said above is sufficient to establish that there is no ground for the second specification of error set forth in the petition (p. 6), namely,—that the lower court erred "In drawing an inference that there was no competition between respondent and honest dealers en-

gaged in the manufacture of similar remedies, in the absence of any proof of that fact."

The trial court, it is respectfully submitted, did not draw any such inference. It proceeded upon the assumption, which the evidence tended to establish affirmatively (R.110-112, 130-134, 159-169), that there was competition between respondent and others in the sale of anti-fat treatments. And as has been shown above, the lower court did not indulge in any inference whatsoever, as to whether respondent's competitors were *"honest"* or otherwise.

The only inference that the lower court drew was that the commodities,—the anti-fat treatments,—sold by respondent's competitors were on the same *index expurgatorius* (compiled by the American Medical Association, and adopted by petitioner) which listed respondent's anti-fat treatment as banned and interdicted; and that the treatments offered by respondent's competitors were "relatively disreputable" (R.550). And, in the footnote at the end of its opinion (R.550), the lower court stated, in substance, that the only reason that it was compelled to resort to inference as to the "relatively disreputable" character of such treatments, was that the petitioner (by its trial examiner) had erroneously prevented respondent from introducing affirmative proof in that regard,—which statement is fully borne out by what appears in the record (R.133-134). But, said the court, in concluding its observations in that connection, the "situation" (with reference to the "relatively disreputable" character of such commodities) "is too plain to require reference for further proofs" (R.550).

VI.

There is no support in the record for the contention that the lower court denied petitioner's jurisdiction upon the ground that no injury to any individual competitor of respondent had been proved, and that injury to respondent's competitors as a class could not be presumed.

Petitioner appears to assert in its brief (pp. 13-14), that the decision of the lower court is grounded upon a denial "that the Federal Trade Commission has jurisdiction to enter an order enjoining false labeling calculated to deceive a substantial portion of the purchasing public, even in the absence of an affirmative showing of injury to any individual competitor, on a presumed injury to competitors as a class, arising out of deception to the public"; and that, because the lower court's decision is based upon such supposed denial, such decision is therefore in conflict with the *Winsted Hosiery Case* (258 U. S. 483) the *Beechnut Case* (257 U. S. 441), and the *Klesner Case* (280 U. S. 19).

What petitioner thus says in its brief may perhaps be regarded as intended to support what appears in the petition at page 6, in the first specification of error, and at pages 7 to 8,—which portions of the petition it is perhaps possible that petitioner would like to have read, in the present connection, as if they did not contain the word "honest" qualifying the word "competitors" therein.

It is respectfully submitted that the lower court did not ground its decision in any degree upon any consideration either that no injury to any particular one of respondent's competitors had been shown affirmatively by proofs, or that injury to respondent's competitors, as a class, could not be presumed in the absence of proof.

All that the lower court said in that connection, was, in substance, this: that the prevention of some sort of

injury (regardless, alike, of whether it was affirmatively proved or merely presumed, and whether it was actual, or merely potential) to a trader's competitors (regardless of whether to a particular competitor, or to some or all of the competitors as a class), arising out of the publication of a false advertisement by such trader, was a condition precedent to its being "to the interest of the public" that petitioner should exercise power to command such trader to cease and desist from publishing such advertisement; that petitioner's order in the case at bar could not reasonably be supposed to have been intended for the protection of respondent's competitors, but rather and primarily for the protection of the public health; and that petitioner had no power to order any trader (apart from protecting his competitors) to cease and desist from publishing any advertisement, merely upon the ground that, in petitioner's opinion, such advertisement contained an evil exhortation to the public, or might induce and lead some persons to do some act, or to adopt some course of conduct, which would or might injure them in their health, or in their morals, and, through them, injure the whole public.

The lower court's language in that regard was (R.549):

> "It is apparent from this record, as well as from other recent or pending cases in this court and other decisions of the Commission and from announcements by its members shown in this record [R. 420, 487-495, 446-449, 438-439],—that the Commission .... believes itself authorized to issue its 'desist and refrain' orders in any case where it concludes that sales methods may mislead a substantial part of the purchasing public, in a way and to an extent that, in the judgment of the Commission, is injurious to the purchaser [i.e., injurious to the purchaser *alone*, regardless of whether there was any injury—actual or potential, presumed or proved—to any individual competitor, or to some or all competitors as a class].

> The general law of unfair competition uses the misleading of the ultimate retail purchaser as *evidence* (court's italics) of the primarily vital fact—injury to the lawful dealer; the Commission uses this ultimate, presumed injury to the final user as *itself* (court's italics) the vital fact. The result is a realization of what was suggested in the former opinion [meaning, an opinion in *L. B. Silver Co. v. Federal Trade Commission*] as the opened vista (289 Fed. 992-993) and a *pro tanto* censorship by the Commission of all advertising..... We..... cannot think that Congress had any conception that it was creating a tribunal for that kind of action. Its failure for many sessions to pass a proposed 'pure fabric' law, and others of similar character, is familiar; but if the Commission's view of its jurisdiction is right these laws are unnecessary."

The lower court's observation, above quoted,—concerning "a realization of what was suggested in the former opinion as the opened vista",—has reference to what Judge Denison had said, in a separate opinion, in *L. B. Silver Co. v. Federal Trade Commission* (1923), 289 Fed. 985, (C. C. A. 6). In that case, Judge Denison said, at pages 992-993:

> "In this matter, as in many others currently familiar, the Commission has adopted the theory that the 'unfair methods of competition' denounced by section 5 include all false, not to say unethical, advertising and promotion of a particular article by which that fraction of the public desiring to purchase an article of that class may be, in a substantial way, misled. *The vista of business censorship seen through such an opening is limitless.* (Our italics). It extends to the advertising of fire sales when there has been no fire, and of cut price sales when there has been no cut, provided sales are to be made across a state line. Such suggestions are not fancifully extreme. In the present case, thousands of pages of testimony have been taken, thousands of dollars of expense incurred,

for the government and for the respondents, and the time and attention of the Commission and of the Circuit Court of Appeals consumed to the total extent of many days—all over questions of porcine genealogy and eugenics. [The question before the court had been whether an advertisement—which stated that a kind of hogs, called Ohio Improved Chesters or O.I.C. hogs, constituted a different *"breed"* of hogs from Chester White hogs—was not false; and whether, having regard for the manner in which such O.I.C. hogs had been produced, and for the science of genetics, the requirement of truth was not that such O.I.C. hogs should be advertised merely as a separate *"strain"* of, and not a different *"breed"* from, Chester White hogs. It was held that whether *"strain"* or *"breed"* was the accurately truthful word to use in such advertisement, was a question of opinion, which the Federal Trade Commission lacked jurisdiction to determine] ..... I do not believe that the Federal Trade Commission was created for any such purpose, or that the time and efforts of the federal courts should be devoted to such situations."

It is clear from the above quoted excerpt from the opinion of the lower court in the case at bar, that the lower court did not hold,—as petitioner asserts in substance, in its brief (p. 13),—that petitioner had no jurisdiction to enter an order to cease and desist against respondent, in the absence of an affirmative showing of injury to one of respondent's individual competitors, upon a presumption of injury to respondent's competitors as a class. No such consideration entered, even remotely, into the lower court's decision.

That the lower court expressly recognized that it was sufficient to give petitioner jurisdiction to issue an order to cease and desist, if there was merely a background of competitors entitled, and intended, to be protected; and that, given such competitors in the background, it was not a prerequisite to petitioner's issuing an order to

cease and desist that any injury to any individual competitor, or class of competitors, should be affirmatively proved,—appears conclusively from what the lower court said in one of the footnotes of its opinion (R.548), wherein the lower court considered those very decisions by this court with which petitioner asserts that the lower court's decision is in conflict. In such footnote, the lower court said (R.548):

> "Attention is drawn to the comment which the Supreme Court, in its opinion in *Federal Trade Commission v. Klesner* (280 U.S. 19, 26-7), made upon the Beechnut case and the Winsted case. The comment is that in neither case did the private right of any competing trader appear to have been invaded. As we noted in our opinion in the *Toledo Pipe-Threading Co. case* (11.Fed. [2d] 337, 343), the Beechnut case needed no evidence of unfair competition with any one. The practice involved and condemned was the price restriction policy. This had been expressly found illegal under the Anti-Trust Act (*Miles Medical Co. case*, 220 U.S. 373), and expressly declared illegal by the Clayton Act. The whole ground of illegality of price restrictions is that it restrains competition between trade competitors. To have considered this ground in making application to the Beechnut case, would have been supererogation. The opinion in the Winsted case expressly declares (p.493): 'the practice constitutes an unfair method of competition as against manufacturers of all wool knit underwear and as against those manufacturers of mixed wool and cotton underwear, who brand their product truthfully. For when misbranded goods attract customers by means of fraud which they perpetrate, trade is diverted from the producer of truthfully marked goods.' And again (p.494) after finding that the public had an interest in stopping the practice as wrongful: 'And since the business of its trade rivals who mark their goods truthfully was necessarily affected by that practice, the Commission was justified,' etc. It seems quite clear

that the Klesner opinion in making reference to the Beechnut case and the Winsted case as not involving invasion of the private right of any trader competed against, intended to put the emphasis upon the right of a *private* or *individual* complaining competitor; and is not inconsistent with the necessity of injury to the class of 'honest manufacturers' who were named and directly protected in the Winsted case, and who were in the background in the Beechnut case" (court's italics).

VII.

If either of the grounds upon which the lower court denied petitioner's jurisdiction was sufficient, there is no necessity for inquiring as to the sufficiency of the other ground.

In *United States v. McFarland* (1927), 275 U. S. 485, this court, in assigning a reason for revoking a writ of certiorari which had been granted, said that

> "The decision of this case does not require a decision of the questions which are presented in the petition for certiorari because of which the writ was granted", etc.

The decision of the case at bar, it is respectfully submitted, does not require a decision of all of the questions presented in the petition for certiorari.

If the lower court was right in deciding that the petitioner lacked jurisdiction upon the first ground hereinabove noted, then this court would find it necessary, it is respectfully submitted, to affirm the lower court's decree,—regardless of what this court's view might be as to whether or not the lower court was right in deciding that petitioner lacked jurisdiction upon the second ground, above noted, which the lower court assigned in that behalf. It would be only in the event that this court should be of the opinion that the lower court was wrong in deciding against petitioner's jurisdiction

upon such first ground, that this court would find it necessary to consider whether the lower court was right or wrong in deciding against such jurisdiction upon such second ground; and only in the event that this court should consider that the lower court was wrong on both grounds, that the lower court's decree could be reversed,—if, indeed, it could even then be reversed, having regard for the constitutional questions that are pointed out hereinafter.

It is so clear, it is respectfully submitted, that the lower court was wholly right in denying the petitioner's jurisdiction, upon the first ground upon which the lower court relied in that regard, that there is no real occasion for this court to consider whether or not a writ of certiorari should be granted to review that part of the lower court's decision in which it held against petitioner's jurisdiction on the second ground.

Respondent would not, however, have it understood that, in submitting the considerations just above noted, respondent thereby impliedly concedes that the lower court was wrong as to either of the grounds upon which it denied petitioner's jurisdiction; or that the lower court was any less clearly right as to the second such ground, than as to the first.

In announcing the premise of the second argument in accordance with which it denied petitioner's jurisdiction, the lower court said, "that the Commission came into being as an aid to the enforcement of the general governmental anti-trust and anti-monopoly policy and that its lawful jurisdiction did not go beyond the limits of a fair relationship to that policy"; and from that premise, the lower court drew the conclusion that, because the order to cease and desist which petitioner had issued against respondent, had not been limited, or even primarily di-

rected, to preventing the general trade in anti-fat treatments from being unduly restrained by the use of alleged unfair methods of competition (alleged false advertising) by respondent therein, but rather had been directed towards altogether destroying such trade, and respondent as a factor in such trade, therefore such order had gone beyond the limits of a fair relationship to the government's general anti-trust and anti-monopoly policy, and was accordingly void. And that the lower court was clearly right in adopting such premise, appears, it is respectfully submitted, not only from the considerations that were reviewed in the *Silver Case* (289 Fed. 985, 993-998), —to which the lower court, in its opinion herein, referred (R.548),—but from other and additional considerations also.

One such additional consideration is that Congress appears to have taken the term *"unfair method of competition"*, for insertion in the Federal Trade Commission Act in 1914, bodily from *Standard Oil Co. v. United States* (1911) 221 U.S. 1, 43,—where it appears to have been used for the first time, as part of the terminology of the law; and where *"unfair methods of competition"* were, in effect, said to be "such as . . . . . *suppress* competition." Another such additional consideration is that the phrase *"to the interest of the public"*, as it appears in the Federal Trade Commission Act, appears to be merely an adaptation by Congress to the statutory context, of such phrases as *"to the prejudice of the public interests"* (found in *United States v. American Tobacco Co.* (1910) 221 U. S. 106, 179), and *"prejudice the public interests"*, (found in *Nash v. United States* (1913) 229 U.S. 373, 376); which phrases were used, in those cases, as indicating a test of when a restraint of trade should properly

be deemed undue and unreasonable,—namely, when such restraint operated *"to the prejudice of the public interests,"* by enhancing prices, etc.

In view of those considerations, Congress, in enacting the Federal Trade Commission Act, appears to have used the term *"unfair method of competition,"* for the purpose of indicating the *kind of acts* about which it was intended that the Commission should concern itself,—namely, acts which tend to *"suppress* competition"; and to have used the phrase *"to the interest of the public"*, for the purpose of indicating *when* the Commission should concern itself about such kind of acts,—namely, when, and only when, such kind of acts should threaten to suppress competition to a degree that, in the Commission's judgment (subject to revision and correction by the courts) was undue or unreasonable, and would result, unless preventive measures should be adopted, in enhancing prices and producing other similar evils.

The lower court was wholly right, it is respectfully submitted, as to the second ground upon which it denied petitioner's jurisdiction, as well as to the first such ground.

VIII.

If neither of the grounds upon which the lower court denied petitioner's jurisdiction were sufficient, petitioner's order to cease and desist would have to be set aside as repugnant to the Constitution.

If the lower court's view that petitioner's order to cease and desist was void for lack of jurisdiction, should be deemed by this court to be wholly erroneous, it would then be necessary for this court to consider and dispose of respondent's constitutional objections to petitioner's order,—which, in the view that the lower court took of

the case, the lower court found it unnecessary to consider; and such objections, alone, require the reversal of petitioner's order.

(1) *Petitioner's order violated the Fifth Amendment.*

The Fifth Amendment requires that "No person shall be . . . deprived of life, liberty, or property, without due process of law." In order to satisfy that requirement, petitioner was bound to accord respondent a fair hearing; and, failing that, petitioner could not make any valid finding, or issue any valid order, against respondent. *Kwock Jan Fat v. White* (1919) 253 U. S. 454, 457-458.

Petitioner did not, it is respectfully submitted, accord respondent such a fair hearing as the Fifth Amendment required. Petitioner was flagrantly and obsessionally prejudiced against respondent, and, in the nature of things and of men, could not possibly accord respondent a fair hearing (R.414-464, 487-495).

Petitioner did not venture to deny the truth of the matter which respondent had averred,—in its answer (R. 408-507) to petitioner's cross bill (R.400-407),—for the purpose of showing petitioner's passion and prejudice against respondent. Such matter was so strongly supported by the documents which respondent pleaded, that there was hardly room to deny its truth; and petitioner contented itself with merely moving to strike such matter out as "irrelevant, impertinent, and immaterial" (R. 509, 510-512).

Petitioner, in its petition (p. 7, par. "(5)"), complains that the lower court erred "In failing to rule upon petitioner's motion to strike out", etc. It is respectfully submitted that the lower court did rule upon, and that it overruled, such motion. The lower court, in its opinion,—*ex. gr.*, in the reference to, "announcements by its [petitioner's] members shown in this record" (R. 549); and

in the sentence which begins, "When it is thought that a particular advertisement should be stopped", and in the four sentences next thereafter (R.549); and possibly elsewhere,—refers to matter that petitioner moved to strike out, as being in the record. The only tenable view is that the lower court treated—and under Equity Rule 33, properly treated—the petitioner's motion to strike out, as admitting the truth of the matter which petitioner sought to have stricken out, which was substantially the whole of respondent's answer; and that the lower court's action, in making reference in its opinion to part of such matter as being part of the record, amounted in effect to the lower court's overruling petitioner's motion to strike out.

Petitioner further failed to accord respondent the fair hearing which the Fifth Amendment required, in that petitioner, in making its findings and conclusions (R. 21-25), arbitrarily and capriciously disregarded the evidence which respondent had introduced in the proceeding before the petitioner (R.517-518; R.383-384, par. "(13)"; R. 385, par. "(16)"; R. 386, par. "(20)"). The Fifth Amendment imposes upon petitioner, as upon every other administrative board, *"the duty of deciding in accordance with the facts proved"*, and forbids that such body should *"capriciously make findings by administrative fiat"*. *Interstate Commerce Commission v. Louisville & Nashville R. Co.* (1913) 227 U. S. 88, 91, 92. An administrative board is *"bound not only to listen but to give legal effect to what has been established"*. *State of Washington, ex rel. Oregon R. & N. Co. v. Fairchild* (1911), 224 U. S. 510, 525. The petitioner, it is respectfully submitted, wholly disregarded those requirements of the Fifth Amendment.

Petitioner could not possibly have made the findings that it did make (R.21-25), it is respectfully submitted,

except by utterly rejecting substantially all of the testimony given by the six physicians that testified favorably to respondent's contentions, before the trial examiner.

Measured by whatsoever standard of excellence may be adopted,—whether by the learning, the experience, and the respective professional standings of the witnesses, or by the candor, temperateness, fairness, and reasonableness of the testimony given by them respectively, and the consistency of such testimony with itself, with common experience, and with the laws of the physical world —the testimony of the six physicians who testified favorably to respondent, is more cogent and convincing than that of the five physicians who testified favorably to petitioner.

There is accordingly no possible ground upon which petitioner's action in disregarding and rejecting substantially all of the testimony adduced by respondent, can possibly be accounted for, except upon the ground that petitioner chose to consider, arbitrarily and capriciously; that respondent's witnesses had wilfully testified falsely.

Petitioner did not have, and could not possibly have had, anything whatsoever upon which it could by possibility form any reasoned or reasonable judgment, or anything other than a whimsical intuition, as to the credibility of any of the witnesses. Petitioner had not seen the respondent's witnesses, or heard them testify. Petitioner's trial examiner alone had seen and heard the witnesses (R.381, 519). He reported to petitioner, in substance, that respondent's medical witnesses were equal in standing and credibility to petitioner's (R.534-537, 548 in footnote). And it is respectfully submitted that petitioner could not fairly or reasonably do otherwise than accept the trial examiner's conclusion, which as above noted he stated in his report, that the credibility of respondent's witnesses was equal to that of petitioner's.

The rule whereby a court accepts as final the conclusion of a master in chancery, an auditor, an assessor, or a commissioner, in respect of the credibility of the witnesses who have testified in person before him, and whom the court has not seen or heard testify, is merely a rule of reason, and does not rest upon any artificial or technical considerations. *Tilghman v. Proctor* (1888), 125 U.S. 136, 149-150; *Medsker v. Bonebrake* (1882) 108 U.S. 66, 71, 72, 73; *Donnell v. Columbian Ins. Co.* (1836) 2 Sum. 366 (Fed. Case, No.3987; 7 Fed. Cas. p.891); *Paddock v. Commercial Ins. Co.* (1870) 104 Mass. 521, 531, It is respectfully submitted that petitioner was obliged, in fairness, to act upon the same reasonable considerations, which led the courts to adopt the rule above noted; and that when petitioner disregarded such reasonable considerations,—as it did when, without ever having seen any of the witnesses or heard them testify, it rejected the conclusion of its trial examiner as to the credibility of respondent's witnesses,—petitioner's action in that regard was unfair, unreasonable, arbitrary, capricious, and repugnant to the Fifth Amendment.

(2) *Petitioner's order violated the First Amendment:*

The First Amendment provides that "Congress shall make no law . . . . . abridging the freedom of speech, or of the press." The order to cease and desist which petitioner entered against respondent,—whereby petitioner forbade respondent, in substance, to advertise its anti-fat treatment, as a medically unsupervised treatment, at all—is repugnant, it is respectfully submitted, to that provision of the First Amendment. *Leach v. Carlile* (1922), 258 U.S. 138, 140-141.

The lower court noticed, but did not decide, the question of the repugnance between petitioner's order and the First Amendment. The lower court said in that regard (R.547-548):

"Another contention should be noticed: Petitioner [respondent in this court] says to the public,—whether the statement happens to be in a printed form or orally,—that this remedy is safe to be taken according to directions by the average person; the Commission orders that the petitioner shall not make this statement unless modified in form to suit the Commission; that is, unless accompanied by the statement that it is safe only when medically supervised. Thereupon, the court, acting as a court of equity, is asked to enjoin the publication. Petitioner contends that such injunction would be a violation of the first amendment, and that its constitutional right to freedom of speech prevents such suppression. This contention is forcefully made; but we find it unnecessary to pass upon it."

CONCLUSION.

In view of the considerations above presented, it is respectfully submitted that no reason exists for the granting of a writ of certiorari as prayed by petitioner, and that the writ should accordingly be denied.

Respectfully submitted,

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ROCKWELL T. GUST,
LEWIS W. MCCANDLESS,
Solicitors for Respondent.

STEVENSON, BUTZEL, EAMAN & LONG,
Of Counsel for Respondent.

October, 1930.

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APR 20 19

CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1930

No. 484

FEDERAL TRADE COMMISSION, PETITIONER,

vs.

RALADAM COMPANY, RESPONDENT.

On writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

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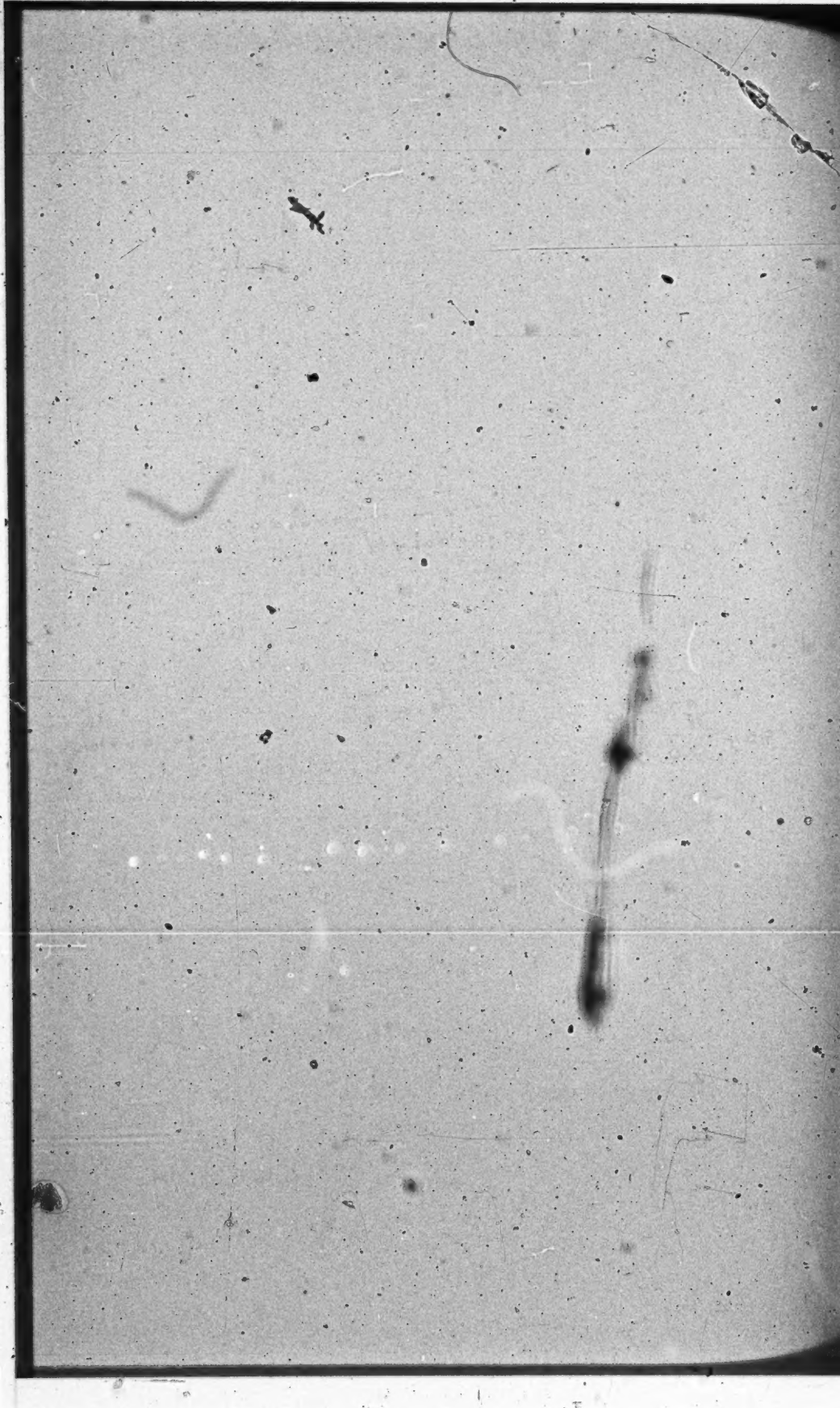

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Supreme Court of the United States

OCTOBER TERM, 1930

No. 484

FEDERAL TRADE COMMISSION, PETITIONER,

vs.

RALADAM COMPANY, RESPONDENT.

On writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR THE RALADAM COMPANY.

OPINION BELOW.

The opinion of the lower court—the Circuit Court of Appeals for the Sixth Circuit (R. 469-480)—is reported in 42 Fed. (2d) 430.

THE QUESTION.

The question presented is as to the jurisdiction of the Federal Trade Commission, and is limited to that (R. 480).

More particularly, the question is as to the power of the Commission to require that the respondent, Raladam Company, shall cease and desist from advertising, in newspapers and magazines, that its treatment (Marmola Pre-

scription Tablets) for the reduction of excessive fat is (1) scientific, and (2) that it can be self-administered internally according to directions, with reasonable safety, under usual and ordinary conditions and circumstances, by the average excessively fat person, having an average case of excessive fatness.

THE STATUTE.

Inasmuch as the relevant part of the statute (Sec. 5 of the Trade Commission Act, 38 Stat. 717, 719), upon which the case at bar turns, is printed in the appendix of the Commission's brief (pp. 41-44), it is not printed in this brief.

STATEMENT.

The facts that the Commission sets forth in its brief (pp. 7-14),—upon the assumption that such facts "may be of importance in deciding the jurisdictional question",—appear to respondent to be incomplete. Respondent, therefore, respectfully supplements them.

Respondent labeled each box of its product, "Marmola is recommended as a treatment for the reduction of excessive fat" (Comm. Exs. 2, 3, R. 42-44, 1, 2),—the "treatment" consisting of thirty-six medicinal tablets (called Marmola Prescription Tablets), intended to be self-administered internally, and of a booklet of instructions (R. 43, 388, 417-424), which were inside the box.

Each of respondent's tablets contained one-half of a grain (1/2 gr.) of desiccated thyroid, together with various other substances (Comm. Ex. 4, R. 48, 1, 2, 9, 422).

The desiccated thyroid was the principal fat-reducing ingredient of respondent's tablets,—the active agents in desiccated thyroid being iodine and thyroxin (R. 129, 202,

271, 298). The cascara sagrada, phenolphthalein, and liquid petroleum in the tablets, were laxatives (R. 50, 53, 82, 117, 182). The extract of bladderwrack (a seaweed) and the extract of phytolacca (pokeroot) contained in the tablets, possibly had a synergistic effect (R. 314),—the bladderwrack containing a small amount of iodine compound (R. 180), and the phytolacca being a laxative (R. 180-181, 313-314). The other ingredients were without particular physiological effect, and were put into the tablets to subserve manufacturing convenience, and to improve the appearance, taste, and keeping qualities of the tablets (R. 53, 181, 267).

The booklet of instructions that was contained inside each box of tablets, set forth the formula in accordance with which the tablets were made (R. 422), and gave instructions not only as to how many tablets should be taken, and when, and for how long a time, but also as to diet and exercise, and other matters as well (R. 43, 388, 417-424). Such booklet stated that the tablets were intended for the "average person" (R. 422), with the "average case" of excessive fatness (R. 418, 422), and read, "Consult your own physician if you want special advice in any unusual condition" (R. 422).

Respondent advertised its treatment widely, in newspapers and magazines, throughout the United States (R. 60-61). The character of respondent's advertising matter is shown by the record (Comm. Exs. 6, 7, 8, R. 65, 1, 2; Comm. Ex. 9, containing 107 sample advertisements, R. 108, 1, 2; Comm. Exs. 10, 11, 12, R. 109-110, 1, 2; R. 388, 425-435). Respondent advertised its tablets to fat people, not to mankind in general.

The Commission charged, in its complaint (R. 2-6), that certain statements that were enumerated in the complaint

(R. 3-4), had been made in respondent's published advertisements; and that such statements had "the tendency and capacity to mislead and deceive the purchasing public" (R. 5); and that, therefore, respondent was guilty of "using unfair methods of competition in interstate commerce" (R. 2), "to the prejudice of the public and of competitors of respondent" (R. 5).

There was no charge in the complaint that respondent acted fraudulently, or with any intent to deceive, in making in its advertisements the statements that the complaint assailed. Neither was there any charge that respondent's tablets were without potency to reduce fat,—mere shams for use in fleecing the public. The charge was rather that such tablets were too potent, and were accordingly dangerous.

The alleged statements in respondent's advertisements that were attacked in the complaint, were subsequently found by the Commission to have been made by respondent, and to have been "false and misleading" (R. 23). But the Commission did not make any finding of any fraud, or of any intent to deceive, on respondent's part. The Commission merely found, in substance, that respondent was making unenlightened statements about its treatment, which, although honest enough, were not, in the Commission's estimation, true and accurate, and so were false and misleading.

The alleged statements in respondent's advertisements that were attacked in the complaint, and were subsequently found to have been made by respondent and to have been false and misleading, are reflected by the terms of the order to cease and desist (R. 26-27), which was eventually issued by respondent.

Such order required (R. 26) that respondent should cease to advertise its treatment "as a scientific and ac-

curate method of treating obesity" (R. 26); or to advertise that "the formula from which 'Marmola' is made is a scientific formula" (R. 26); or to advertise that "'Marmola' is the result of scientific research" (R. 26). For convenience of discussion, the specific prohibitions that were thus imposed upon respondent, may be referred to, in general terms, as an order that respondent should not advertise its treatment as scientific.

Such order further required (R. 26-27) that respondent should cease to advertise that its treatment could "be taken without the advice and direction of competent medical authority as a safe and harmless remedy in the treatment of obesity"; or to advertise that its treatment could "be taken with no harmful result to physical health without the advice and direction of competent medical authority"; or to advertise its treatment at all "as a remedy for the treatment of obesity unless such representation is accompanied by a statement that 'Marmola' cannot be taken with safety to physical health except under the direction and advice of competent medical authority."

For convenience of discussion, such prohibitions may be referred to, in general terms, as a prohibition that respondent should advertise its treatment as one that could be safely self-administered internally (*i. e.*, safely taken internally without medical direction or control).

The Commission says in its brief (p. 6) that respondent, in its petition for review (R. 373-384), did not take any exception to the Commission's having found that the respondent had made, in its advertisements, the representations concerning respondent's treatment that are reflected by the terms of the Commission's order to cease and desist. That is true. But also it is true that the findings that the Commission made, as reflected by the

terms of its order, must be construed and given effect (as must the order itself), in the light of the whole record, and not otherwise.

The respondent's advertisements that are in the record, show that respondent did expressly state in its advertisements, in substance, that its treatment was scientific. Therefore, the findings by the Commission that the respondent did so advertise, may justly be given effect in the terms in which they stand, as reflected by the terms of the Commission's order.

But there is not a shred of evidence in the record to show that respondent ever expressly stated in its advertisements, that its treatment could be safely self-administered. The only representation that respondent ever made at all, in respect of whether or not its treatment could be safely self-administered, arose by implication from the fact that it advertised its treatment as one intended to be taken internally, and to be self-administered. The fact that respondent advertised its treatment for sale, as one to be self-administered internally, implied that respondent's treatment could be self-administered internally with some degree of safety,—not necessarily with absolute, unlimited safety,—by the generality, not of mankind, but of the particular class of persons to whom the treatment was advertised, namely, the excessively fat. The fair implication of respondent's advertisements thus did not exceed an implied representation that respondent's treatment could be self-administered internally with reasonable safety, in accordance with directions, by the average excessively fat person, having an average case of excessive fatness,—under usual and ordinary conditions and circumstances.

The finding of the Commission, as reflected by its order, in respect of respondent's having advertised its treatment

as safe for self-administration internally, gets the only support that can be found for it in the record, from the implication that arose—in terms as above stated—out of respondent's having advertised its treatment as one intended to be taken internally by the excessively fat; and such finding must be confined, in its meaning and effect, within the limits of such implication. Unless such finding be so confined, it must be regarded not only as not supported by any substantial evidence, but as not supported by any evidence at all, in the record; and hence it must fall altogether.

The effect that the Commission's order, if valid, would have in respect of the continued operation of respondent's business, is manifest.

The part of the Commission's order that forbids respondent to advertise its treatment as scientific, is of relatively small importance. If valid, such part of the order would not be ruinous of respondent's business.

The part of the order that forbids the respondent to advertise that its treatment can be safely self-administered internally, is of a different character. If valid, such part of the order means, in practical effect, that respondent cannot advertise its treatment at all,—which is the same thing as saying that respondent cannot continue in business at all. That conclusion follows from the circumstance that if respondent advertises its treatment at all, as one intended to be taken internally, respondent thereby necessarily implies that it can be safely self-administered; and from the further circumstance that, if respondent must qualify such implication solely in the manner that is specified in the Commission's order, and in no other manner,—namely, by advertising that the only way in which a person that buys respondent's treatment may safely take it, is by first employing a physician, and administering the

treatment to himself under such physician's direction and control, and not otherwise,—then, for all practical purposes, respondent might as well, or better, not advertise its treatment at all, and shut up shop altogether.

The Commission's entire attack upon the respondent's act of advertising, by implication, that its treatment may be safely self-administered, is grounded upon the fact that respondent's Marmola tablets contain desiccated thyroid. That appears conclusively from the complaint (R. 4-5).

It is true that there is a finding (R. 22, and R. 24, par. 11) that, because of the laxative content of Marmola tablets, the taking of respondent's treatment would be likely to create a "laxative habit," on the part of the person taking the treatment. That finding may be supposed to be intended to support the conclusion that respondent's treatment is not scientific, and may not be safely self-administered internally. But there is no charge in the complaint that respondent's advertisements were rendered false and misleading by reason of the laxative content of respondent's tablets; there is not even a reference in the complaint to the laxative content of respondent's tablets, and nothing at all in the complaint to which the finding as to the creation of a "laxative habit" may be regarded as germane.

Although the record contains some evidence about laxatives and the creation of a "laxative habit",—as to which the testimony of at least one of the Commission's own medical witnesses may reasonably be surmised not to have been altogether satisfactory to the Commission (R. 117),—the record shows that the Commission's principal effort was directed towards showing that desiccated thyroid is a dangerous substance, and cannot be administered safely except under medical surveillance; and that, therefore,

respondent's treatment,—because its tablets contain desiccated thyroid, and are intended to be self-administered,—is unsafe and unscientific; and that, therefore, respondent's representations in its advertisements—expressly to the effect that its treatment is scientific, and impliedly to the effect that its treatment is reasonably safe for self-administration by an average excessively fat person—are false and misleading.

The Commission did not produce anybody to testify that he, or she, had ever been injured by the self-administration of respondent's tablets internally. Neither did the Commission produce any witness to testify that he, or she, had ever seen anybody that had ever been injured by the self-administration of respondent's tablets internally. Respondent's tablets have, however, been made and sold continuously, for upwards of twenty years,—since August, 1907 (R. 38-39).

The Commission sought to establish the dangerous character of desiccated thyroid,—and, therefore, the unsafe and unscientific character of respondent's treatment,—solely by the opinion evidence of medical witnesses. The record is, however, replete with evidence—some of it supplied by the Commission's own witnesses—that desiccated thyroid is not an inherently dangerous substance at all.

Desiccated thyroid can be bought by anybody, even a child, at any drug store, without a prescription, the same as can calomel, or quinine, or laxative pills, or any other non-poisonous drug (Resp. Ex. 1, R. 91, 53-54, 237, 297, 326).

Desiccated thyroid is a standardized substance, listed in the United States Pharmacopoeia (U. S. P.). According to that authority, and other testimony, desiccated thy-

roid is a yellowish powder with a slight, characteristic odor; is made by drying and powdering the thyroid glands of domesticated animals that are used for food by man, after first freeing such glands from connective tissue and fat, five grains of fresh glands producing about one grain of dried gland; and contains on an average about 0.2 per cent—which would be two parts in a thousand—of iodine (R. 129, 271, 298). In addition to the iodine, desiccated thyroid is supposed to contain another active substance, called thyroxin; only a very little of such latter substance has ever been isolated, however, and a number of tons of thyroid were required to be reduced, in order to obtain that little (R. 202),—so that the thyroxin content of desiccated thyroid may accurately be said to approach very closely to the limit of smallness (R. 202). Each of respondent's Marmola tablets, containing one-half of a grain of desiccated thyroid, may thus be said to contain about one one-thousandth of a grain of iodine, and an infinitesimally small quantity of thyroxin.

The administration of desiccated thyroid is a recognized treatment for obesity (R. 145-146, 297, 300). Taking desiccated thyroid will reduce weight, whether the thyroid be self-administered in the form of respondent's tablets, or be administered by a physician (R. 92, 95).

Desiccated thyroid does not contain any morphine, or any derivative of morphine (R. 150). It is not a dangerous drug (R. 328),—if indeed it should not rather be called a "biological," instead of having the word *drug* applied to it at all (R. 298, 299). It is not habit-forming; nor is it a contraceptive agent; nor can it be used for homicidal or suicidal purposes (R. 328, 335). A few physicians "felt quite a phobia" about thyroid, fifteen or twenty years ago; but physicians generally have got over their awe about thyroid (R. 327, 328).

The thyroid glands of domesticated food animals, from which desiccated thyroid is prepared, are located in their necks. In preparing head-cheese, which as everybody knows was commonly made and sold in all butcher-shops before the great development of the packing industry, the part of the neck that contained the thyroid glands, went into the head-cheese, and everybody that ate head-cheese administered to himself internally a small dose of thyroid (R. 298-299). Thyroid is a normal constituent of the human body, and of the bodies of all mammals (R. 298-299, 304); and if the diet is such that thyroid does not occur in the food, it is desirable that thyroid, or its constituents, be obtained from some other source (R. 298-299).

The harrowing instances of the apparently injurious effects of taking thyroid that are set forth in the Commission's brief (p. 12), indicate nothing except that the persons that are there referred to, had what the doctors call an idiosyncrasy for thyroid. In the parlance of the medical profession, to say that a person has an idiosyncrasy for any particular substance, means that such person is specially sensitive to such substance, and that when he consumes it internally, he experiences unpleasant results or develops disagreeable symptoms—such, for instance, as excitement, hives, angioneurotic edema, hay fever, asthma, a sudden rise in temperature, or even convulsions —that the average person does not experience or develop (R. 336-337, 238). Among the substances in respect of which, in addition to thyroid (R. 104, 177, 220), idiosyncrasies have been observed to be more or less frequent, are alcohol, morphine, quinine, strawberries, shell fish, lobsters, cow's milk, and white bread (R. 101, 126-127, 149-150, 336-337).

The dose of desiccated thyroid, as given in the present (tenth) edition of the U. S. P., is one grain; in the ninth revision, it was one and one-half grains; in the 1900 (R. 194) or eighth revision, it was four grains,—such dose to be given one, two, three, or four times a day, in the discretion of the physician (R. 351, 236, 271, 272, 325, 327). The statement in the Commission's brief (p. 9) with reference to respondent's having reduced the thyroid content of its tablets from time to time, is to be read in the light of the successive reductions of the U. S. P. dose of thyroid.

Nobody knows what the lethal, or fatal, dose of desiccated thyroid is, in the case of a healthy human being; as a guess, it is up in the hundreds of grains (R. 333-334, 342).

A dose of forty grains might be injurious by raising the metabolic rate of the person taking it, to an unduly high point (R. 237, 252, 335-336). But in some cases of nephrosis,—a kidney disorder that involves primarily the tubules,—a dosage as high as sixty grains a day has been used over a long period of time (R. 289).

Dr. Haverstock, who—as noted in the Commission's brief (p. 13)—regularly gives his patients from a minimum of six to a maximum of forty grains of thyroid a day (R. 363), specializes in the treatment of obesity, and has treated several thousand patients in the last ten or twelve years, and has been using thyroid for that length of time, and uses half a million grains of thyroid a year in his practice (R. 362). The doses given by some of the other physicians that testified, are noted in the Commission's brief (p. 13). In addition, it may be noted of the Commission's witnesses, that Dr. Strouse gives doses of from one-fourth to one-half of a grain of thyroid, three times a day (R. 141); Dr. Kebler, from one-fourth of a grain to fifteen grains a day (R. 194); and Dr. Clark, from one-

tenth of a grain to three grains a day (R. 223). Dr. Kebler can hardly be said to be a practicing physician at all (R. 171, 191-192). The indication of the record is that Dr. Haverstock had probably had more actual experience in administering thyroid, than all of the other doctors combined.

Persons taking respondent's tablets according to directions, four times a day, would take only two grains of thyroid daily. The Commission's own witness, Dr. Elliott, testified, "I don't believe a very high percentage [of obese people] would be definitely harmed by that amount",—*i.e.*, by two grains of thyroid daily, taken in four quarter-grain doses (R. 103-104). And there is no question but that the respondent honestly believes its treatment to be safe (R. 52).

All drugs that have any physiological effect,—and even some food substances, such as salt, mustard, sugar, meat, fat, and bread,—if taken in too large doses and for a long enough time, have a toxic effect and produce toxic symptoms (R. 96, 126).

The symptoms that develop upon taking too much thyroid,—a more rapid heart action, nervousness, tremors, sweating, and sleeplessness,—are merely those that follow from unduly increasing the metabolism of the body by violent exercise, such as by running (R. 97-98, 100);—meaning, by "metabolism", the whole life process (except reproduction), the sum total of all of the chemical and physio-chemical changes that take place in the body between the time when materials from the outside (such as air, water, and food) enter the body, and the time when they get back to the outside world again (R. 121, 300-301). Inasmuch as thyroid is a normal constituent of the human body, and of the bodies of all mammals, it cannot, even in

large doses, do anything more than to increase the chemical changes of the body, so that they are sped up to an increased rate. If a person takes too much thyroid, he becomes alert; but he does not have convulsions. He perspires; but he does not go into collapse. He has a tremor; but the tremor never develops into a general spasm. If a person should take large doses of thyroid "for quite some time", he might lose rapidly in weight, but he would not die (R. 304, 298-299).

A person that develops the symptoms that follow upon the taking of too much thyroid, is likely to find them disagreeable, and to stop taking the thyroid and consult a physician accordingly (R. 98-99). If he doesn't consult a physician at all, the disagreeable symptoms disappear spontaneously, within from four to six days after he stops taking thyroid; and that is the end of the matter (R. 106, 104). If a person takes too much thyroid, it does not deplete his system; it does not make him more susceptible to contagious diseases than otherwise he would be. Thyroid is one of the great anti-toxins manufactured in the body; and hyperthyroidism increases resistance to infection from pneumococci, streptococci, and staphylococci (R. 316, 318).

The advice that was contained in the booklet that respondent supplied with each box of its tablets,—"Consult your own physician if you want special advice in any unusual condition",—was very well adapted to prevent anybody's being injured through overdosing himself with thyroid by taking respondent's tablets. The words "unusual condition", which respondent used in its booklet, are about the words that a physician would use upon dismissing a patient, after prescribing a course of medication for him, with instructions to return by a day certain; he would say to the patient, with a view to safeguarding

against overdosing, "If any unusual condition develops, come back even before the time I have set" (R. 311, 248-249).

The Commission asserts with great confidence in its brief (p. 9), just what happens when thyroid is administered,—namely, the increasing of the "burning up of food products and bodily tissues", due to the fact that the thyroid "enters the blood stream and stimulates all cells". The doctors that the Commission called as witnesses, are not so confident that they know so much about the action of thyroid. After having testified that thyroid stimulated the metabolic activity of the cells of the body, Dr. Elliott, when asked "How does it do it?", answered "God knows; nobody else"; and when asked "Why does it do it?", answered, "Nobody knows" (R. 106). Nevertheless, he considered, he said, that physicians did not administer thyroid just by an empirical trial-and-error process, but that they could and did achieve a "very scientific" administration of thyroid; but he also thought, he said, that an achievement could be "scientific", even though "you don't know how or why it happens" (R. 106),—which perhaps indicates that the word *scientific* is of very loose and vague connotation, elsewhere than in respondent's advertisements. Dr. Clark, when asked whether the chief action of thyroid is to increase the metabolic rate, said: "When you get on the subject of the ductless glands [i.e., in the human body], you are on a subject that is still in the process of being worked out. That is one of the chief functions of the thyroid gland, to give off a substance that increases the activity, but it probably gives off other substances that are related to the other ductless glands, like the pituitary, the ovaries, the testicles, the adenals [adrenals] and so forth" (R. 225). Dr. Kebler testified that the medical profession changed its ideas, and made ad-

vancements, from time to time, in respect of thyroid, as well as in respect of everything else (R. 195). Dr. Elliott testified that it often happens that he thinks that he knows all about a given therapeutic measure, and subsequently changes his mind; and that he was not prepared to say that he would not change his view in respect of thyroid (R. 103). One of the Commission's witnesses (Dr. Woodyatt) testified that "if it were a case of incipient goitre it might be flared up by the administration of too much thyroid" (R. 118); another of the Commission's witnesses (Dr. Elliott), as understood, testified circumstantially to just the opposite (R. 74-75).

It is not essential to the safe administration of thyroid that a person's basal metabolic rate (B. M. R.), referred to in the Commission's brief (p. 10), should be ascertained in advance of beginning the administration of thyroid, and watched while the administration of thyroid is going on; in other words, it is not essential that thyroid should not be administered except under what the Commission's witness, Dr. Elliott (R. 86), referred to as "metabolic control". The only method of measuring a person's B. M. R. is by means of one or another of several sorts of machines. Thyroid was regularly administered for twenty years before such machines were invented. Such machines are not generally available, even now; they cannot be operated except by specially trained operators; they take account of only one of the several bodily processes that enter into metabolism; and are recognized by the medical profession, generally, to give only inaccurate and rather unreliable results (R. 241, 255, 301-302, 353, 195-196).

It is true that all of the respondent's medical witnesses testified that they examined their obese patients physically, before administering thyroid to them; but they also testified that they examined all of their patients physically,

before administering anything at all to any of them. And they were not moved to examine obese patients, to whom they proposed to administer thyroid, by any consideration that thyroid is a dangerous substance, but by quite other considerations (R. 354-355).

It is true, also, that the respondent's medical witnesses testified that they kept their obese patients under surveillance, while such patients were undergoing treatment. But that practice, too, was dictated by other considerations than that thyroid is a dangerous medicament (R. 310, 355). And Dr. Keeton testified that he had permitted two of his patients, each of whom was taking two grains of thyroid daily, to go from Chicago to Florida,—inferably to remain for the winter,—and to continue taking two grains of thyroid daily while they were there, entirely free from medical supervision; and that he had not adopted any other precaution than to tell such patients that if certain symptoms, which he attempted to describe to them, should appear, they should then discontinue taking the thyroid (R. 258, 265-266).

There is, of course, some testimony—whether properly to be regarded as substantial, or not—to the contrary. There is testimony to the effect that it is not safe to take any drug,—even castor oil,—except under medical direction and control (R. 96); and to the effect that it is not safe to undertake to reduce obesity, even by dieting and exercising,—without the use of any drug,—except under medical supervision (R. 86, 125, 209, 222).

Respondent's Marmola tablets are, and for fifteen years have been, manufactured for respondent, and for the former owner of respondent's formula,—in accordance with such formula,—by Parke, Davis & Company (R. 34, 38-39). That company, by its physician, has made sugges-

tions from time to time, as to changing the formula, *e. g.*, as to reducing the thyroid content of the tablets (R. 49-51). The formula is a safe and scientific one (R. 313-314).

The Commission's medical witnesses testified that, in their opinion, respondent's treatment was neither scientific nor safe (R. 84, 86, 115-116, 187, 190, 220). The respondent's witnesses testified that they regarded the respondent's treatment as both scientific and safe,—and they told circumstantially why they thought so (R. 244, 246-247, 249, 251, 257, 267, 276, 280-281, 304-307, 313-314, 319, 326, 328, 333, 336, 347, 352, 363-364).

The Commission's trial examiner,—before whom all of the testimony that was taken had been adduced, and who alone had heard any of the witnesses testify or had seen them while they were testifying (R. 471, 458, 376),—made a report upon the facts to the Commission (R. 461-468). Such report is referred to in, and an excerpt therefrom is quoted as a footnote to, the lower court's opinion herein (R. 472). In such report, the Commission's trial examiner said, in substance, that all of the medical witnesses that testified,—five for the Commission, and six for the respondent,—appeared to be of equally high standing in their profession, and of equal credibility; that however the two groups of witnesses differed sharply in their testimony as to whether or not respondent's treatment was scientific and safe; and that such issue appeared to be a scientific dispute, the determination of which could not be safely or justly predicated upon the evidence that had been taken.

SUMMARY OF ARGUMENT.

The first division of the portion of this brief that is hereinafter devoted to argument (pages 19 to 24, *infra*), headed, "The Commission Misapprehends the Grounds upon Which the Lower Court Denied the Commission's Jurisdiction",—is, in effect, a summary of the entire argument that is presented in behalf of the Raladam Company.

ARGUMENT.

I.

THE COMMISSION MISAPPREHENDS THE GROUNDS UPON WHICH THE LOWER COURT DENIED THE COMMISSION'S JURISDICTION.

By the terms of Section 5 of the Trade Commission Act, the power of the Commission is limited (1) to making "findings as to the facts", which, "if supported by testimony, shall be conclusive", and (2) to issuing orders, based on such findings, requiring persons to "cease and desist", (3) from using "unfair methods of competition in commerce", (4), if, and only if, the issuance of such orders is "to the interest of the public"; and by the terms of Section 4 of such Act, "commerce" means only interstate or international commerce. The term "unfair methods of competition in commerce" describes a concept of law. *Federal Trade Commission* v. *Gratz* (1920) 253 U. S. 421, 427, 437. So, also, does the term "to the interest of the public" describe a legal concept. "The specific facts established may show, as a matter of law, that the proceeding which it [the Federal Trade Commission] authorized is not in the public interest, within the meaning of the Act." *Federal Trade Commission* v. *Klesner* (1929), 280 U. S. 19, 30.

The determination of the question whether the Commission had power to issue the order that is involved in the case at bar, depends upon ascertaining the content of the respective legal concepts that are described by the terms "unfair methods of competition in commerce", and "to the interest of the public"; upon ascertaining whether the Commission limited itself to making findings as to the facts, or undertook to settle disputed questions of scientific opinion; upon ascertaining whether the order that the Commission issued, was merely an order to "cease and desist", or something else; and upon ascertaining whether such order was really—as distinguished from avowedly—issued to protect competition and competitors in interstate commerce, or for some other purpose.

The Commission's brief, as understood, appears to assert, in substance, that the lower court grounded its denial of the Commission's jurisdiction, upon one or more of the following considerations:

(1) That the term "unfair methods of competition in commerce", as used in the Trade Commission Act, includes only (a) "those situations indicating a substantial tendency to restraint of trade and monopoly", and (b) "'palming off' cases". (Commission's brief, pp. 16, 19-20, 20-24.)

(2) That such term,—"unfair methods of competition in commerce",—as used in such Act, excludes all of the following: (a) Unfair competitive practices that are injurious only to disreputable, dishonest competitors, and the suppression of which will benefit only such competitors. (Commission's brief, pp. 17, 20, 24-25, 27-28.) (b) Unfair competitive practices that are injurious to any competitor except one affirmatively shown not to be guilty of the use of unfair competitive methods himself. (Commission's brief, pp. 17-18, 20, 28-32.) (c) Unfair com-

petitive practices that consist of acts that are within the jurisdiction of the Department of Agriculture and the Department of Justice, under the Food and Drugs Act. (Commission's brief, pp. 32-33.) (d) The making of such representations as were made by respondent in its advertisements, as to its Marmola treatment being "scientific" and "safe". (Commission's brief, pp. 18, 33-39.)

(3) That the import of the term "to the interest of the public", as used in the Trade Commission act, is such as to require a conclusion that it is not "to the interest of the public" that unfair competitive practices against only dishonest, disreputable competitors alone, should be suppressed. (Commission's brief, pp. 16-17, 26-27.)

It is respectfully submitted that no consideration approximating to even the general nature of any of those that are above noted,—except, perhaps, to the general nature of those above numbered (1), (2) (d), and (3),—entered at all into the lower court's denial of the Commission's jurisdiction.

It is respectfully submitted that the considerations upon which the lower court's denial of the Commission's jurisdiction can be sustained,—without regard to whether, or to what extent, the lower court actually took all of such considerations into account in reaching its decision,—are substantially these:

(1) That the term "unfair methods of competition in commerce", as used in the Trade Commission Act, includes only such competitive practices as—in addition to being "unfair"—tend substantially to suppress, competition, either directly, or indirectly through the medium of injuring the competitors of the person using any such practice, either by unfairly lessening the market for the commodity sold by such competitors, or by weakening

their competitive strength by unfairly depriving them of their customers, or otherwise. (See pages 24 to 39, *infra*).

(2) That the term "unfair methods of competition in commerce" excludes practices that, although injurious to members of the purchasing public, do not tend substantially to suppress competition. (See pages 40 to 47, *infra*.)

(3) That the Commission's power is limited to making findings in respect of matters of fact, and does not extend to determining either disputes as to matters of opinion, or questions of law; and that the question of what implied representations as to the safety of self-administering respondent's treatment internally, were made by respondent's publishing its advertisements, is a question of law; and that the representations, both express and implied, that were made by respondent's advertisements, were representations as to matters of mere opinion,—so that the Commission's declaring such representations to be false and misleading, necessarily amounted to nothing else than an attempted determination of a controverted question of opinion, and of medical opinion at that. (See pages 47 to 58, *infra*.)

(4) That if the publishing of advertisements in newspapers and magazines falls at all within the term "unfair methods of competition in commerce", and so within the cognizance of the Commission,—which is denied,—the prevention of the publishing of such advertisements cannot lie within the Commission's power, unless the advertisements published are not merely false and misleading, but are fraudulent. (See pages 58 to 61, *infra*.)

(5) That if such term—"unfair methods of competition in commerce",—as used in such Act, includes the publishing of advertisements in newspapers and magazines at all,

(which is denied), then the advertisements that were published by respondent do not fall within such term, for two reasons: (a) because respondent's advertisements were not fraudulent; and (b) because, if respondent's advertisements were fraudulent, there is no substantial evidence that respondent had any competition, or any competitors, in selling medicinal internal antifat treatments in interstate commerce, to which, or to whom, the publishing of respondent's advertisements was, or could be, injurious. (See pages 61 to 84, *infra*.)

(6) That such term,—"unfair methods of competition in commerce",—as used in such Act, does not include the publishing of advertisements in newspapers and magazines, regardless of the character of the advertisements, whether fraudulent or not; because to permit the Commission to exercise preventive control of the publication of any newspaper or magazine advertisement whatsoever, would be repugnant to the provision of the First Amendment that guarantees freedom of speech and of the press. (See pages 85 to 105, *infra*.)

(7) Inasmuch as the power of the Commission is limited to interstate commerce, the Commission had no lawful power to institute its proceeding, or to issue its order, against respondent; because the real, as distinguished from the avowed, purpose of the Commission's proceeding and order against respondent was not to prevent injury to, or the suppression of, competition in the selling of proprietary medicinal internal antifat treatments in interstate commerce, or to prevent injury to respondent's competitors, if any, in such commerce,—but was rather to destroy respondent's business, for the benefit of members of the medical profession, who, although they were the persons that were injured, principally if not indeed exclu-

sively, by the selling of respondent's Marmola treatment, were not, in the practice of their profession, engaged in interstate commerce at all, and hence were not entitled to be protected by the Commission against "unfair methods of competition in commerce", or against anything else. (See pages 105 to 117, *infra.*)

(8) That the Commission's order against respondent is void, because it is such, in its terms, as to go beyond a mere order to "cease and desist", and hence was in excess of respondent's lawful powers. (See pages 117 to 120, *infra.*)

(9) That it is not "to the interest of the public", within the meaning of that term as used in the Trade Commission Act, that the Commission should spend its time, and the public's money, in instituting the proceeding that was instituted, and issuing the order that was issued, against respondent; because all (and not only just some) of such competitors, if any, as respondent had in the business of selling proprietary medicinal internal anti-fat treatments, were relatively disreputable. (See pages 121 to 131, *infra.*)

II.

THE TERM "UNFAIR METHODS OF COMPETITION IN COMMERCE" INCLUDES ONLY SUCH PRACTICES AS ARE BOTH UNFAIR, AND ALSO TEND SUBSTANTIALLY TO SUPPRESS COMPETITION.

The first use by any court of the term "unfair methods of competition", occurred—as far as has been discovered—in *Standard Oil Co.* v. *United States,* (1911), 221 U. S. 1, and thus preceded the passage of the Trade Commission Act by upwards of three years. In that case, in summarizing the Government's bill of complaint, Chief Jus-

tice White, for the majority of the court, said in part, at pages 42-43, that

> "the bill at great length additionally set forth various means by which....., in addition to the effect occasioned by the combination of alleged previously independent concerns, the monopoly and restraint complained of was continued. Without attempting to follow the elaborate averments on these subjects ....., it suffices to say that such averments may be grouped under the following heads: ....*unfair methods of competition*, such as local price cutting at the points where necessary *to suppress competition*; espionage of the business of competitors, the operation of bogus independent companies, and payment of rebates on oil, which the like intent" [*i. e.*, "where necessary to suppress competition"].

The four practices that Chief Justice White thus characterized generically as "unfair methods of competition", —namely, local price cutting, espionage, the operation of bogus independent companies, and the giving of rebates, wherever necessary to suppress competition,—were but special instances of a numerous class of practices, the existence of which practices, and their potentiality to destroy competition and to promote monopoly, had been brought to light in litigation, under the Sherman Act (26 Stat. 209), that had preceded the enactment, on September 26, 1914, of the Trade Commission Act. See, for instance, *Peoples Tobacco Co.* v. *American Tobacco Co.* (1909), 170 Fed. 396, 399-403; *Ware-Kramer Tobacco Co.* v. *American Tobacco Co.* (1910), 180 Fed. 160, 166-168; *United States* v. *Patterson* (1912), 201 Fed. 697, 701-704; *United States* v. *Hamburgh American S. S. Line* (1914), 216 Fed. 971, 973.

Publicists and economists, also, had used the term, "unfair methods of competition", prior to the enactment of the Trade Commission Act, in substantially the same sense as that in which Chief Justice White used such term, in the *Standard Oil case* (221 U. S. 1, 43), as above quoted. Thus Mr. E. Dana Durand, in lecturing on "The Trust Problem", at Harvard University in April, 1914, made reference to "Price discriminations and other *unfair methods of competition*". In addition to price discriminations, he recognized as "*unfair competitive methods*" the obtaining of preferential rates from common carriers, and exclusive purchase and sale arrangements. *Quarterly Journal of Economics*, Vol. 28, pp. 391, 392-394. And Mr. William S. Stevens, in writing on "Unfair Competition", in June and September, 1914, mentioned and discussed, as instances of unfair competition, the four practices that Chief Justice White had characterized as "unfair methods of competition" in the *Standard Oil case* (221 U. S. 1, 43), as above quoted, together with seven other classes of practices of a similar character, to wit: maintenance of "fighting ships" and "fighting brands"; full line forcing, that is, compelling persons desirous of purchasing or leasing certain articles, to purchase or lease other and unwanted articles, as a condition of their obtaining the desired articles; exclusive purchase and sale arrangements; acquisition of exclusive or dominant control of machinery or goods used in manufacturing; manipulation; blacklists, boycotts, and whitelists; and coercion, threats, and intimidation. *Political Science Quarterly*, Vol. 29, pp. 282-306, 463-485, 490.

There is no reason to believe that Congress, when it enacted the Trade Commisison Act, used the term "unfair methods of competition" in such statute, in any other sense than that which, as above pointed out, had thereto-

fore been impressed upon such term, or with any intention of designating, by such term, any other practices than those that possessed the same general characteristics as the practices above noted. The use in interstate trade of practices of such sort constituted the recognized evil that gave rise to the enactment of such statute,—the evil that such statute was designed to cure.

Although not of crucial importance, it is perhaps worth observing that it appears to be not strictly accurate to say, as is said in the Commission's brief (p. 21), that "Both the House Bill and Senate Bill covered only 'unfair competition', and the words 'unfair methods of competition in commerce' were adopted in conference."

The genesis of the Trade Commission Act appears to have been that a bill (H. R. 15613) was first introduced in, and passed by, the House, and then sent to the Senate; that the Senate Committee on Interstate Commerce struck out all parts of H. R. 15613 following the enacting clause thereof, and substituted for the matter thus stricken out, the text of a bill (S. 4160) that had been previously introduced in the Senate; that the Senate subsequently adopted such substitute bill; that such substitute bill, containing the text of S. 4160, in lieu of the text of H. R. 15613, then went to conference; and that the conference managers then reported still another substitute bill, which was eventually adopted by both the House and the Senate (See *L. B. Silver Co.* v. *Federal Trade Commission* (1923), 289 Fed. 985, 993, 994, 996-997 (C. C. A. 6); Senate Reports, No. 597 of June 13, 1914, and No. 583 of June 24, 1914, and House Report No. 533 of April 14, 1914, 63d Cong., 2d Sess.).

However, the germ of what eventually became Section 5 of the Trade Commission Act, appeared in S. 4160, as

Section 5 thereof (Senate Report No. 597, *supra*, pages 3-4). And Section 5 of S. 4160 did contain the term "unfair methods of competition in commerce". It is true that such term did not appear in the first sentence of Section 5 of S. 4160, as it appears in the first sentence of Section 5 of the Trade Commission Act. The first sentence of S. 4160 was only "That *unfair competition* in commerce is hereby declared unlawful." But after thus first declaring "unfair competition" unlawful, Section 5 of S. 4160, in the next succeeding sentence, proceeded to declare that "The [Federal Trade] Commission is hereby empowered and directed to prevent corporations from using *unfair methods of competition in commerce*"; and in the sentence following next thereafter, the words "*unfair method of competition in commerce*" appear once, and the words "*method of competition*" appear twice.

The general characteristics of all of the practices to which the general term "unfair methods of competition" had come to be applied, long before the Trade Commission Act was enacted, were obvious. They were all injurious to competition, either as tending to lessen the market of the competitors of the tradesman that resorted to such practices, or to deprive such competitors of their customers and drive such competitors out of business or weaken their competitive strength, or as tending to curtail competition otherwise. In addition, all of such practices could aptly be described as "unfair", either because they were characterized by deception, bad faith, fraud, or oppression, and hence were repugnant to good morals; or because, if not immoral *per se*, they were of such nature inherently as not to be susceptible of use, without tending automatically to injure and destroy competitors and competition, *e. g.*, local price cutting.

Federal Trade Commission v. *Gratz* (1920), 253 U. S. 421, is understood to declare that the term, "unfair", as used in the Trade Commission Act, has substantially the signification above stated. In that case, Mr. Justice McReynolds, for the majority of the court, said, at page 427:

> "The words 'unfair method of competition' are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade."

See, also, *Federal Trade Commission* v. *Raymond Bros-Clark Co.* (1924), 263 U. S. 565, 572.

An "unfair method of competition in commerce" may operate directly and immediately to hinder or suppress competition, as did the practice that was condemned in *Federal Trade Commission* v. *Beech-Nut Packing Co.* (1922), 257 U. S. 441,—namely, a practice whereby a manufacturer maintained the resale prices of his products, and thereby prevented competition among dealers in its products. Or, an "unfair method of competition in commerce" may operate to suppress competition not directly and immediately, but only indirectly and mediately by and through injuring the trade of the competitors of the tradesman that uses such practice, and thereby rendering such competitors the less able to compete with such tradesman efficiently or at all. Such was the nature of the fraudulent practice that was condemned in *Federal*

Trade Commission v. *Winsted Hosiery Co.* (1922), 258 U. S. 483,—namely, the practice, on the part of a manufacturer, of fraudulently labeling or branding underwear, in such manner as to represent that it was made wholly of wool, when in truth it was made in part of cotton.

The theory upon which it is understood that the practice that was involved in the *Winsted Hosiery case* (258 U. S. 483), was held to be an "unfair method of competition in commerce", appears from the following language of Mr. Justice Brandeis, speaking for the majority of the court, at pages 493, 494:

> "The labels in question are literally false..... All are.....calculated to deceive and do in fact deceive a *substantial portion* of the purchasing public..... The facts show.....that the practice constitutes an unfair method of competition as against manufacturers of all wool knit underwear and as against those manufacturers of mixed wool and cotton underwear who brand their product truthfully. For when misbranded goods attract customers by means of the fraud which they perpetrate, *trade is diverted* from the producer of truthfully marked goods..... The honest manufacturer's business may suffer, not merely through a competitor's deceiving his direct customer, the retailer, but also through the competitor's putting into the hands of the retailer an unlawful instrument, which enables the retailer to increase his own sales of the dishonest goods, thereby *lessening the market* for the honest product."

As the *Winsted Hosiery case* (258 U. S. 483) is understood, the controlling facts therein were the "lessening the market" for, and hence the restraining of competition in, all-wool underwear and honestly branded cotton-and-wool underwear, by deception; the lessening of the competitive strength of honest manufacturers as competitors,

through injuring them financially by taking away their customers, by deception; and the circumstance that the lessening of the market, and of the competitive strength of the honest manufacturers, was "substantial", because the deception in question affected a "substantial portion" of the purchasing public,—which constituted the market, and the ultimate source from which the patronage and the money that were necessary to enable the honest manufacturers to survive, must be derived. Except for those facts, the decision in that case, it is understood, would have been the opposite of what it was—despite the fraudulent misbranding. And it was essential that the injury to competition should have been "substantial",—as appears from the observation in the *Klesner case* (280 U. S. 19, 28), "To justify filing a complaint the public interest must be specific and substantial."

As the *Gratz case* (253 U. S. 421),—the majority opinion in which is quoted, in part, hereinabove,—is understood, the reason that the majority of the court declined to sustain the Commission's order that was there under consideration, was that the Commission's complaint, upon which such order rested, failed to show that the practice that was there in question, either tended directly to suppress competition, or was indirectly injurious to competition through being injurious to the competitors of the persons that were being proceeded against; and that, therefore, such complaint failed to show that such practice was an "unfair method of competition in commerce", within the meaning of the Trade Commission Act, under the facts pleaded in the complaint.

The practice that was in question in the *Gratz case* (253 U. S. 421), was that of forcing purchasers who desired to buy steel ties for use in baling cotton, to buy also, as a condition of obtaining such ties, six yards of jute bagging—which also was used in baling cotton—for

every six ties purchased. Such practice was, in a degree, oppressive and coercive, and hence was susceptible of being reasonably regarded as "unfair"; it was a practice of the nature of the "full line forcing" and the "tying contracts", which—as had been brought to light in litigation under the Sherman Act, before the Trade Commission Act was adopted—had been found, by experience, to be efficient schemes for suppressing competition and creating or perpetuating monopoly.

But inasmuch as the Commission's complaint did not charge that the persons that were being proceeded against, who were using such practice, had a monopoly of either ties or bagging, or the ability, purpose, or intent to seek to acquire one, the majority of the court considered that such practice was not shown by the complaint to constitute, under the circumstances there set forth, "an unfair method of competition in commerce", within the meaning of the Trade Commisison Act.

Mr. Justice McReynolds, for the majority of the court, speaking of the complaint in the *Gratz case* (253 U. S. 421), said (p. 428): "The..... amount [of ties and bagging] controlled by them [the persons that were being proceeded against] is not stated; nor is it alleged that they held a monopoly of either ties or bagging, or had ability, purpose or intent to acquire one." And he concluded, "Nothing is alleged [in the complaint] which would justify the conclusion that the public suffered injury or that competitors had reasonable ground for complaint",—which is understood to mean that nothing was alleged in the complaint that tended to show that the practice in question had injured the public, through the working of an injury to competition, either directly, or indirectly through lessening the market for the products of competitors, or through weakening the competitive strength of any competitor by injuring him in his trade.

Mr. Justice Brandeis, with whom Justice Clarke concurred, in a dissenting opinion, considered that the propriety of the Commission's order in the *Gratz case* (253 U. S. 421) should be determined not with reference to the complaint alone, but with reference to the evidence also. And because the evidence showed that the principals of the persons that were being proceeded against, for whom such persons acted as agents in selling ties and bagging, were monopolistic concerns, Mr. Justice Brandeis considered that, therefore, an injury to competition had been done or threatened, and that the Commission's order should be upheld accordingly. In discussing the Trade Commission Act, he indicated that an "unfair method of competition in commerce" within the meaning of such statute, is a practice the "apprehended effect" of which is "suppressing competition by destroying rivals". His language was (pp. 441-442): "The purpose of Congress was to prevent any unfair method which may have been used by any concern in competition from becoming its general practice. It was only by stopping its use before it became a general practice, that the apprehended effect of an unfair method in *suppressing competition* by destroying rivals could be averted."

In *Federal Trade Commission* v. *Sinclair Refining Co.* (1923), 261 U. S. 463, Mr. Justice McReynolds, speaking for the court, used language that clearly showed that the purpose of the Trade Commission Act is only to protect competition and competitors. He there said, at page 476:

> "The great purpose of both statutes [the Trade Commission Act and the Clayton Act] was to advance the public interest by securing fair opportunity for the play of the contending forces [*i.e.*, competition] ordinarily engendered by an honest desire for gain."

In *Standard Oil Co.* v. *Federal Trade Commission* (1922), 282 Fed. 81, (C. C. A. 3),—affirmed (1923), 261 U. S. 463,—Judge Wooley, for the majority of the lower court, said at page 87:

> "Therefore in determining whether given acts amount to unfair methods of competition within the meaning of the Federal Trade Commission Act, or substantially lessen competition and tend to create a monopoly within the meaning of the Clayton Act, the only standard of legality with which we are acquainted is the standard established by the Sherman Act in the words 'restraint of trade or commerce' and 'monopolize or attempt to monopolize', and by the courts in construing the Sherman Act with reference to acts 'which operate to the prejudice of the public interest by unduly restricting competition or unduly obstructing the due course of trade' and 'restrict the common liberty to engage therein'..... Under the Federal Trade Commission Act declaring unfair methods of competition unlawful.....a loan of a curb-pump outfit without return or a lease without rental did not, we think, tend to create a monopoly, and accordingly was not, in our opinion, an unfair method of competition."

In *Philip Carey Mfg. Co.* v. *Federal Trade Commission* (1928), 29 Fed. (2d) 49, (C. C. A. 6), the Commission had issued an order forbidding the use, by those against whom it was proceeding, of any system of espionage for the purpose of obtaining information as to the facilities, capacities, operations or customers of competitors. Judge Moorman, for the majority of the court, said (p. 50) that

> "before the Commission was warranted in entering the espionage order, it was necessary that it find upon substantial evidence that the information was unlawfully used to *hinder or stifle competition*."

In *Kinney-Rome Co.* v. *Federal Trade Commission* (1921), 275 Fed. 665, (C. C. A. 7), Judge Page, for the court, said, in substance, that in order that there might be an "unfair method of competition in commerce", there must be, besides fraud, a lessening of competition—or, what comes to the same thing, an injury to a competitor—resulting from such fraud. His language was as follows, at pages 668, 669:

> "We conclude, from the discussion of the term 'unfair competition' by the courts, and we are of opinion, that there must be some fraud in trade that *injures a competitor, or lessens competition,* before it can be said that there has been used an 'unfair method of competition' (p. 668) . . . . . Unless that which petitioner [the manufacturer that was being proceeded against] did, fraudulently affected some competition in which either or both [*i. e.*, both the petitioning manufacturer and competing manufacturers] were interested, then the order to cease and desist was improvidently entered."

And again, in *Chicago Portrait Co.* v. *Federal Trade Commission* (1925), 4 Fed. (2d) 759, (C. C. A. 7), Judge Page, for the majority of the court, said at page 763:

> "From the forbidden acts [meaning, the acts that the Federal Trade Commission had forbidden in that case] there seems to us to be *no possibility of injury to competitors,* and we are of opinion that they are neither within the letter nor the spirit of the act."

The lower court, in the case at bar, is understood to have announced substantially the same conclusion as the one that is understood to have been reached in the decisions that are above noted,—namely, the conclusion that in order that a practice may be an "unfair method of

competition in commerce", within the meaning of the Trade Commission Act, such practice must be either directly injurious to competition, or indirectly injurious to competition through injuring competitors. Such—and nothing else—is understood to be the effect of the language that is quoted next hereinbelow, in part from the body of the lower court's opinion, and in part from a footnote appended thereto.

In the body of the lower court's opinion herein, Judge Denison said (R. 477-478):

> "In the *Silver case* [*L. B. Silver Co.* v. *Federal Trade Commission*] (289 Fed. 985) one member of the court [Judge Denison] took occasion (p. 992) to study the history of the creation and purposes of the Federal Trade Commission. The conclusion was reached that the commission came into being as an aid to the enforcement of the general governmental antitrust and antimonopoly policy, and that its lawful jurisdiction did not go beyond the limits of fair relationship to that policy. Since that opinion there has been no decision of the Supreme Court inconsistent therewith, nor any Circuit Court of Appeals decision which expressly denies that theory. Doubtless there have been opinions from these latter courts which are more or less inconsistent with its full acceptance; but the accuracy of the historical study then made has never, so far as we know, been particularly challenged, either by judicial opinion or in the periodical literature of the law. This court, as now constituted, is prepared to and does adopt the general view there stated, as to the foundation of the commission's jurisdiction. See also our opinion in *Beskey* [*Berkey*] *and Gay* v. *F. T. C.*, [42 Fed. (2d) 427] this day filed. The thing forbidden by the statute is *unfair competition*. This can not exist unless there is *competition*, and there can not be *competition* unless there is something to compete with. It must

be evident that the trade which was to be protected against restraint (and unfair competition is a kind of restraint) was that legitimate trade which was entitled to hold its own in the trade field without embarrassment from unfair competition. The first thought might be that the one invoking protection should be a particular trader; but the *Winsted case* (258 U. S. 483) teaches that protection will also be given under this statute to *the entire class of trade which is having its former customers taken away from it* by false representations that the competing goods are of the same descriptive qualities as those put out by the complaining class."

And in a footnote appended to the lower court's opinion, Judge Denison said (R. 477-478):

"Attention is drawn to the comment which the Supreme Court, in its opinion in *Federal Trade Commission* v. *Klesner* (280 U. S. 19, 26-7), made upon the *Beechnut case* and the *Winsted case*. The comment is that in neither case did the private right of any competing trader appear to have been invaded. As we noted in our opinion in the *Toledo Pipe-Threading Co. case* (11 Fed. (2d) 337, 343), the *Beechnut case* needed no evidence of unfair competition with any one. The practice involved and condemned was the price restriction policy. This had been expressly found illegal under the anti-trust act (*Miles Medical Co. case*, 220 U. S. 373), and expressly declared illegal by the Clayton Act. The whole ground of illegality of price restriction is that it *restrains competition between trade competitors*. To have considered this ground in making application to the *Beechnut case*, would have been supererogation. The opinion in the *Winsted case* expressly declares (p. 493): 'The practice constitutes an unfair method of competition as against manufacturers of all wool knit underwear and as against those manufacturers of mixed wool and cotton underwear, who brand their product truth-

> fully, for when misbranded goods attract customers by means of fraud, which they perpetrate, trade is diverted from the producer of truthfully marked goods.' And again (p. 494) after finding that the public had an interest in stopping the practice as wrongful: 'And since the business of its trade rivals who mark their goods truthfully was necessarily affected by that practice, the commission was justified,' etc. It seems quite clear that the *Klesner opinion* in making reference to the *Beechnut case* and the *Winsted case* as not involving invasion of the private right of any trader competed against, intended to put the emphasis upon the right of a private or individual complaining competitor; and is not inconsistent with the necessity of injury to the class of 'honest manufacturers' who were named and directly protected in the *Winsted case,* and who were in the background in the *Beechnut case.*"

The study of the creation and purpose of the Federal Trade Commission, to which Judge Denison referred as above quoted, appears in Judge Denison's separate opinion, in *L. B. Silver Co.* v. *Federal Trade Commission* (1923), 289 Fed. 985, 993-998, (C. C. A. 6). No useful purpose would be subserved by attempting to summarize such study here; it should be read in its entirety.

The language that is above quoted from the lower court's opinion herein, coupled with what Judge Denison said in his study that appears in the *Silver case* (289 Fed. 985), furnishes the sole possible source from which the Commission could have derived the erroneous notion that is set forth in its brief (pp. 16, 19-20, 20-24),—namely, the notion that the lower court asserted, in its opinion in the case at bar, that "the Federal Trade Commission Act is limited to those situations indicating a substantial tendency to restraint of trade or monopoly

and to 'palming off' cases." (Commission's brief, p. 16.) Judge Denison's language that is quoted hereinabove from the opinion of the lower court in the case at bar, even when read in connection with what Judge Denison said in the *Silver case* (289 Fed. 985), will not bear—it is respectfully submitted—the interpretation that the Commission, in its brief, seeks to put upon such language. Such language, it is respectfully submitted says no more, and means no more, than that substantial injury of some kind—whether direct or indirect, and whether constituting an invasion of any private right, or not—either to competition or to competitors, is indispensable to the existence of an "unfair method of competition in commerce", within the meaning of the Trade Commission Act.

The foregoing considerations, it is respectfully submitted, establish that the publishing by respondent of the advertisements that are in question in the case at bar, cannot be held to have constituted the using by respondent of any "unfair method of competition in commerce", upon any other basis than that the publishing of such advertisements was substantially injurious to, and tended substantially to suppress, competition in the trade of selling antifat treatments in interstate commerce, either directly, or indirectly through the medium of weakening the competitive strength of respondent's competitors, if any, in such trade, either by unfairly lessening the market for the products of such competitors, or by unfairly depriving them of their actual or potential customers.

III.

THE TERM "UNFAIR METHODS OF COMPETITION IN COMMERCE" EXCLUDES PRACTICES THAT, ALTHOUGH INJURIOUS TO MEMBERS OF THE PURCHASING PUBLIC, DO NOT TEND SUBSTANTIALLY TO SUPPRESS COMPETITION.

From what has been said above,—to the effect that, in order that a competitive practice may be an "unfair method of competition in commerce" within the operation of the Trade Commission Act, it is essential that such practice should be "unfair", and that it should also be injurious to competition, either directly and immediately, or indirectly through the medium of injuring competitors, —it follows, as a corollary, that the term "unfair method of competition in commerce", necessarily excludes any and all fraudulent, oppressive, or otherwise unfair practices that are injurious only to members of the purchasing public alone, and are not injurious either to competition, or to the competitors of the tradesman that uses such practices.

Such corollary was formally stated by Judge Denison for the lower court, in the case at bar, in the language from the lower court's opinion that is quoted next hereinbelow; and such language did not go beyond the statement of such corollary. Judge Denison's words in that connection were (R. 478-479):

> "It is apparent from this record, as well as from other recent or pending cases in this court and other decisions of the Commission and from announcements by its members shown in this record,—that the Commission does not take this limited view of its jurisdiction [i.e., does not regard its power as limited to preventing only such fraudulent practices as are injurious to competition or competitors], but that it believes itself authorized to issue its 'desist and refrain' orders in any case where

it concludes that sales methods may mislead a substantial part of the purchasing public, in a way and to an extent that, in the judgment of the Commission, is injurious to the purchaser. The general law of unfair competition uses the misleading of the ultimate retail purchaser as *evidence* of the primarily vital fact,—injury to the lawful dealer; the Commission uses this ultimate, presumed injury to the final user as *itself* the vital fact. The result is a realization of what was suggested in the former opinion [in the case of *L. B. Silver Co.* v. *Federal Trade Commission*] as the opened vista (289 Fed. 992-3) and a *pro tanto* censorship by the Commission of all advertising. This particular case relates to medicine advertising, and of a class doubtless disapproved by the 'best people',—who can afford to employ good doctors; but that disapproval cannot create jurisdiction..... We have no occasion to deny, nor indeed, reason to doubt, that this elimination [i.e., the elimination of the respondent Raladam Company's proprietary medicine business, as being injurious to the health and purses of the persons purchasing respondent's Marmola tablets] would tend to the public good; but we cannot think that Congress had any conception that it was creating a tribunal for that kind of action. Its failure for many sessions to pass a proposed 'pure fabric' law, and others of similar character, is familiar; but if the Commission's view of its jurisdiction is right, these laws are unnecessary." (Court's italics.)

Judge Denison's above quoted observation—as to "a realization of what was suggested in the former opinion as the opened vista (289 Fed. 992-3) and a *pro tanto* censorship by the Commission of all advertising"—has reference to what Judge Denison had said in his separate opinion in the *Silver case* (289 Fed. 985). In that case, the question was whether it constituted fraudulent advertising, and hence the using of an "unfair method of competition in commerce" within the meaning of the

Trade Commission Act, for a breeder of hogs to advertise that a kind of hogs that were called Ohio Improved Chesters or O. I. C. hogs, constituted a different *"breed"* from Chester White hogs,—the contention of the Federal Trade Commission being that, having regard for the science of genetics and the ancestral derivation of O. I. C. hogs, the requirement of truth was that O. I. C. hogs should be advertised as merely a separate *"strain"* of, and not a different *"breed"* from, Chester White hogs. And Judge Denison in that case said, in part, at pages 992-993:

> "In this matter, as in many others currently familiar, the Commission has adopted the theory that the 'unfair methods of competition' denounced by section 5 include all false, not to say unethical, advertising and promotion of a particular article by which that fraction of the public desiring to purchase an article of that class may be, in a substantial way, misled. The vista of business censorship seen through such an opening is limitless. It extends to the advertising of fire sales when there has been no fire, and of cut price sales when there has been no cut, provided sales are to be made across a state line. Such suggestions are not fancifully extreme. In the present case, thousands of pages of testimony have been taken, thousands of dollars of expense incurred, for the government and for the respondents, and the time and attention of the Commission and of the Circuit Court of Appeals consumed to the total extent of many days—all over questions of porcine genealogy and eugenics ..... I do not believe that the Federal Trade Commission was created for any such purpose, or that the time and efforts of the federal courts should be devoted to such situations."

The adoption of any other view than the one that, as appears above, was adopted by the lower court in the case at bar,—namely, the view that the Federal Trade

Commission has no power to protect the purchasing public from injuries generally, or to protect it from any injuries except those that are also injuries to competition, or to competitors, in interstate trade,—would result in manifest absurdity.

If the term "unfair methods of competition in commerce", as used in the Trade Commission Act, should be construed as providing that—subject only to the condition that all proceedings instituted, and orders issued, by the Federal Trade Commission shall be "to the interest of the public"—the Commission is empowered to investigate, and to prevent, all practices in interstate trade that are injurious merely to the purchasing public alone, even though such practices are not injurious to competition in interstate trade, or to the competitors in interstate trade of the tradesman using such practices, it is manifest that such construction would be equivalent to declaring that the Commission is vested with power to police interstate trade generally. The public good—"the interest of the public"—is the object, and marks the limits, of the police power. To say that the Commission's power, in respect of protecting the public from injury in interstate trade, is not limited to the Commission's concerning itself only about injuries to competition and to competitors in such trade,—to say that the Commission's power extends to protecting the purchasing public from all injuries in interstate trade from which it is "to the interest of the public" that the purchasing public should be protected, regardless of whether such injuries to the purchasing public tend to suppress competition,—would be to vest general police power, in respect of interstate trade, in the Commission. That Congress intended to vest any such power in the Commission, can hardly be contended.

No authoritative decision has been discovered that is understood to countenance the view that the Federal Trade Commission has power to protect the members of the purchasing public from any injurious practices in interstate trade, unless such practices are also injurious to competition, or to the competitors of the person that resorts to such practices, in such trade.

The *Winsted Hosiery case* (258 U. S. 483), *supra,* is not understood to be any authority for the view that the Federal Trade Commission has power to prevent injurious practices in interstate trade, merely because they injure members of the purchasing public, apart from their being injurious, also, to competition, or to the competitors of the person that commits such injuries.

It is indeed true that in the *Winsted Hosiery case* (258 U. S. 483), the majority of the court said, of the false labels that were there in question, "All are, as the Commission found, calculated to deceive and do in fact deceive a substantial portion of the purchasing public." But that observation is understood to have been made, merely by way of pointing out how an injury to the competitors of the concern that had used such false labels, and hence an injury to competition, had been brought about,—and not by way of declaring that any and every practice in interstate trade that is injurious to members of the purchasing public, is *ipso facto* an "unfair method of competition in commerce" within the operation of the Trade Commission Act, regardless of whether such practice is, or is not, injurious to interstate competition, either directly and immediately, or indirectly and mediately through its injurious effect upon competitors. What the majority of the court is understood to have declared in the *Winsted Hosiery case* (258 U. S. 483), is, in effect this: that a substantial injury to competition in interstate trade in all-wool underwear, and in honestly branded

cotton-and-wool underwear, had been shown to exist,—consisting of a lessening, by deception, of the market for all-wool underwear and for honestly branded cotton-and-wool underwear, and of a weakening of the competitive strength of honest manufacturers of such kinds of underwear; that the cause of such injury was that a substantial number of members of the purchasing public had been deceived and imposed upon by the false labeling of underwear that was made partly of cotton, as being made wholly of wool, and had thereby been induced to buy such underwear, when otherwise they would have bought either all-wool, or honestly branded cotton-and-wool underwear; and that, inasmuch as the Federal Trade Commission had power to prevent such injury to competition, it therefore had power to prevent the false labeling,—not independently of such injury, and not for the purpose (as either a primarily important or an ultimate end in itself) of protecting the public from being cheated, but solely by reason of the fact that the false labeling was the effectual producing cause of the injury. As the *Winsted Hosiery case* (258 U. S. 483) is understood, it was a mere adventitious incident—a by-product—of attaining the primary end and object of protecting competition, that the court prevented the fraud that was being practiced upon members of the purchasing public; and if the situation had been merely that members of the purchasing public were being defrauded, but that no injury was being worked therefrom either to competition, or to the competitors of the concern that was practicing the fraud, the court would not have sustained the Commission's order, just for the sake of protecting only the members of the purchasing public alone from fraud.

Federal Trade Commission v. *Sinclair Refining Co.* (1923), 261 U. S. 463, supports the view that injury to members of the public, apart from injury to competition,

does not properly concern the Commission. In that case, the contention was urged, in substance, that the practice, on the part of certain refiners and wholesalers of oil, of furnishing pumps to their retailers at a nominal rental, constituted an "unfair method of competition in commerce", in that, although such practice did not injure competition or competitors in the oil industry, it did injure manufacturers of pumps, by lessening the demand for pumps by retailers and so depriving the manufacturers of the opportunity of selling pumps that, except for such practice, they might have sold.

Mr. Justice McReynolds, for the court, referring to such contention, said at page 476:

> "The suggestion that the assailed practice is unfair because of its effect upon the sale of pumps by their makers is sterile and requires no serious discussion."

In the *Chicago Portrait Company's case* (4 Fed. (2d) 759, (C. C. A. 7), the opinion in which is quoted, in part, hereinabove, the Portrait Company had used a selling practice, whereby the purchasing public had been beguiled, by falsehood and trickery, into buying enlargements of photographs. The majority of the court characterized such practice as "reprehensible, and an unworthy device to be employed in trade." Judge Alschuler, in his dissenting opinion, characterized it as "a rather mild sort of fraud." The majority of the court considered, however, (Judge Alschuler dissenting), that such fraud "had no tendency to injure any competitor" of the Portrait Company; and the Commission's order that forbade the use of such practice, was accordingly vacated.

The foregoing considerations, it is respectfully submitted, establish that the Commission's order herein cannot be upheld, on any theory that, even though the

publishing of respondent's advertisements was not substantially injurious to competition, or to the respondent's competitors, if any, in the trade of selling antifat treatments in interstate commerce, nevertheless such advertisements were false and misleading, and the publication of them therefore did tend to mislead a substantial number of members of the public into buying and taking respondent's Marmola treatment, to the substantial injury of the purses and health of the persons that were misled; and that the Commission is possessed of power to issue an order, for the purpose of putting an end, in the public interest, to such supposed imposition upon such persons and others like them.

IV.

THE COMMISSION'S POWER IS LIMITED TO MAKING FINDINGS IN RESPECT OF QUESTIONS OF FACT, AND DOES NOT EXTEND TO DETERMINING EITHER DISPUTES AS TO MATTERS OF OPINION, OR QUESTIONS OF LAW.

The verbiage of Section 5 of the Trade Commission Act is sufficient, by itself, to establish that the Commission has no power to determine disputes as to matters of opinion. Such part of Section 5 provides that the Commission shall "state its findings as to the *facts*",—not its findings as to opinions; and that the "findings of the commission as to the *facts*",—not as to opinions,—"if supported by testimony, shall be conclusive." The Commission has not been made, in any degree, an arbiter of opinion,—whether in the field of therapeutics, or in any other field; and the Commission cannot subject any honest expression of opinion to the Commission's condemnation and inhibition, howsoever silly or even vicious such opinion may be deemed to be or may actually be, either by proceeding upon the fiction that the expression of such opinion constitutes an "unfair method of competition in commerce," or in any other manner.

What was said by the lower court in its opinion (R. 472-476), is sufficient to establish both that the representations that were made by respondent in and by its published advertisements, as to the safety and scientific character of its treatment, were mere expressions of opinion; and, also, that as expressions of opinion, they did not appear to embody opinions that were unsound or unsustainable, if the words *scientific* and *safe* were taken in a liberal, but wholly permissible, sense.

In addition, it may be observed that the Commission itself, by its counsel, in examining its witnesses as to whether respondent's treatment was scientific and could be safely self-administered internally, proceeded upon the assumption that such questions went to matters of mere opinion; in instances, the interrogatories that the Commission put to its witnesses were so phrased as, formally and in terms, to recognize that the matters that were being inquired about, were mere matters of opinion, and not matters of fact at all (*e. g.*, as to "scientific", R. 86, 190; and as to "safe", R. 84, 115-116, 187, 220).

Further, the whole controversy that was before the Commission, as to whether respondent's treatment could properly be advertised as scientific and safe, hinged upon the question of what were the therapeutic effect and properties of desiccated thyroid,—a question as to which the medical witnesses, who were in a position to know, expressed radically contradictory views, and for the determination of which there did not, and does not, exist any established external rule or standard of truth whatsoever.

The authorities clearly establish that a question of such character is purely one of opinion, and nothing else,—from which it necessarily follows that the dependent question of what is scientific and safe in respect of the self-administration of desiccated thyroid internally, cannot be other than a question of mere opinion.

In *School of Magnetic Healing* v. *McAnnulty* (1902), 187 U. S. 94, the question was as to the validity of a fraud order that had been issued by the Postmaster General, forbidding the delivery of mail to complainant. Such question turned upon the further question as to whether fraud could be predicated of a representation by the complainant, which was to the effect that complainant could cure people of their ills by a system of healing that was different from divine healing and from Christian Science, and was grounded upon the theory that the human mind is largely responsible for, and that a proper exercise of the brain and mind can cure, human physical ailments. It was held that such representation was as to a matter of mere opinion, and that fraud could not be predicated of it,—there being nothing to show that the complainant did not honestly entertain the belief that it expressed in its representation.

Justice Peckham, for the majority of the court, said at pages 104-105:

> "The claim of the ability to cure may be vastly greater than most men would be ready to admit, and yet those who might deny the existence or virtue of the remedy would only differ in opinion from those who assert it. There is no exact standard of absolute truth by which to prove the assertion false and a fraud. We mean by that to say that the claim of complainants cannot be the subject of proof as of an ordinary fact. . . . . We may not believe in the efficacy of the treatment to the extent claimed by complainants, and we may have no sympathy with them in such claims, and yet their effectiveness is but matter of opinion in any court."

And again Justice Peckham said, at page 105:

> "Suppose a person should assert that by the use of electricity alone, he could treat diseases as effica-

ciously and successfully as the same have heretofore been treated by 'regular' physicians. Would these statutes justify the Postmaster General, upon evidence satisfactory to him, to adjudge such claim to be without foundation . . . . . ? The moderate application of electricity, it is strongly maintained, has great effect upon the human system, and just how far it may cure or mitigate diseases no one can tell with certainty. It is still in an empirical stage, and enthusiastic believers in it may regard it as entitled to a very high position in therapeutics, while many others may think it absolutely without value or potency in the cure of disease. Was this kind of question intended to be submitted for decision to a Postmaster General . . . . . ? As the effectiveness of almost any particular method of treatment of disease is, to a more or less extent, a fruitful source of difference of opinion, even though the great majority may be of one way of thinking, the efficacy of any special method is certainly not a matter for the decision of the Postmaster General . . . . ."

After referring to the controversies that have existed between those that have favored and those that have opposed vaccination as a preventive of smallpox, and between the allopathic and the homeopathic schools of medicine, and saying that such controversies involved nothing but questions of opinion, Justice Peckham concluded, at page 107:

"It may perhaps be urged that the instances above cited by way of illustration do not fairly represent the case now before us, but the difference is one of degree only. It is a question of opinion in all the cases, and although we may think the opinion may be better founded and based upon a more intelligent and a longer experience in some cases than in others, yet after all it is in each case opinion only, and not existing facts with which these cases deal. There are, as the bill herein shows, many believers in the truth of the claims set forth by complainants, and it

is not possible to determine as a fact that those claims are so far unfounded as to justify a determination that those who maintain them and practice upon that basis obtain their money by false pretenses within the meaning of these statutes. The opinions entertained cannot, like allegations of fact, be proved to be false, and therefore it cannot be proved as matter of fact that those who maintain them obtain their money by false pretenses or promises, as that phrase is generally understood, and, as in our opinion, it is used in these statutes."

Bruce v. *United States* (1912), 202 Fed. 98, (C. C. A. 8), was a prosecution for using the mails to defraud. Defendants were charged with mailing advertisements that a remedy, called "Habitana", designed for self-administration, would cure the morphine habit. Such remedy contained morphine. The instructions that defendants supplied with the remedy, directed that the remedy be taken in progressively diminishing doses, until finally none at all would be taken. When a morphine addict arrived at the point where, after having followed instructions, he would not be taking any of the remedy at all, then he would be cured. Physicians testified that one way to cure morphinism is to give morphine in progressively diminishing doses until finally the morphine victim can get along without any of the drug. The view of such physicians was, however, that nobody afflicted with the morphine habit could cure himself by that method of treatment; that the will of a person having the morphine habit would be too weak to enable him to decrease progressively the dose of the drug, if self-administered; and that only by putting himself under the control of a physician, or a nurse, could he get a progressively decreasing dose of morphine. Therefore such physicians concluded that the representation by defendants in their advertising matter, to the effect that "Habitana", self-administered, would cure the mor-

phine habit, was a false representation. Obviously the view of the physicians, that one with the morphine habit would be too weak of will to reduce progressively the dose of morphine he was administering to himself,—upon which view they predicated their conclusion that Habitana could not truthfully be said to be a cure for the morphine habit,—was matter of mere opinion. Evidence was introduced to show that occasionally a morphine victim had not been so weak of will as to be unable to cure himself by progressively decreasing self-administered doses of the drug. The defendants asked that the jury be charged as follows: "The court charges the jury that whether the defendants are to be convicted . . . . . does not depend upon the opinion of the medical men that Habitana is not curative of morphinism; on the contrary, if the jury find from the evidence that whether 'Habitana' is remedial in character when exhibited as part of the treatment of morphinism, is merely a matter of opinion among medical men, the defendants must be acquitted. No conviction of fraudulent purpose can lawfully be based upon matters merely of opinion." The trial court declined to charge the jury as requested, and defendants were convicted. The reviewing court reversed the conviction, being of opinion that the requested charge should have been given to the jury.

In *Stunz* v. *United States.* (1928) 27 Fed. (2d) 575, (C. C. A. 8),—which otherwise has no apparent bearing upon the case at bar,—Judge Symes expressed a commonplace vividly in the following language, at pages 578-579:

> "Medicine is not an exact science. A respectable amount of authority can be cited to dispute the value of any well recognized method of treating disease . . . . . The so-called quack remedy of today may be hailed tomorrow as an absolute cure, and vice versa. Vaccination, for instance, is believed by a large ma-

jority of the medical profession and the public to prevent smallpox. Others, with equal sincerity, openly advocate the contrary view. When the white man and the Indian hunted deer together, and the meat divided up, the liver, discarded by the white man, was prized by the Indian for its medical properties. Today it is prescribed by the medical profession as a certain cure for pernicious anemia. Not many years ago the so-called Chinese herb doctors were prosecuted under this identical statute for representing that portions of dried fish—especially the head—were a cure for heart trouble. It is now established that adrenalin—which can be obtained from certain kinds of fish—is a powerful heart stimulant. Many other illustrations could be given—all to the point which we wish to emphasize—that a conviction in a case such as this must be bottomed on something more than conflicting opinion evidence."

The foregoing considerations and authorities sufficiently establish that the question of the therapeutic properties and effect of desiccated thyroid, and the dependent questions of whether respondent's Marmola treatment is scientific and can be safely self-administered internally, are questions of mere opinion.

The manner in which the Commission undertakes, in its brief (pp. 18, 34), to combat the conclusion that respondent's representations as to its treatment being scientific and safe, were mere expressions of opinion, is more entertaining than convincing. Thus the Commission says in its brief (p. 18): "Respondent advertised its remedy as safe, pleasant, and free from harmful consequences. Its unqualified statements were a representation that medical opinion was in agreement that the remedy could be safely taken, although this was a matter of sharp scientific and medical controversy. It represented the question of safety to be a fact when *it was mere opinion.*" Such reasoning is

hardly to be taken seriously; the fallacies in it are too numerous and too obvious. It may, however, be pointed out that the Commission's complaint did not charge that respondent had "represented the question of safety to be a fact when it was mere opinion",—whether falsely and fraudulently, or otherwise; and did not charge that respondent had represented—whether falsely and fraudulently, or otherwise—"that medical opinion was in agreement that the remedy could be safely taken."

Such questions as these:—namely, whether desiccated thyroid is a safe or a dangerous substance; in what manner such substance effects the results that it does effect; what is a safe dose of such substance, to be self-administered internally; what persons may, and what persons may not, safely take thyroid; whether the advice contained in the booklet that respondent supplied with its tablets, was sufficient reasonably to safeguard persons taking its tablets from injury; whether it is necessary that a person that contemplates taking thyroid, should first subject himself to a physical examination at the hands of a physician, and have his basal metabolic rate determined; whether a person taking thyroid should be under medical surveillance at all times, and have his basal metabolic rate determined from time to time; what is the value of a metabolic rate determination effected by a machine; whether the combination of ingredients that is found in respondent's tablets, is a good one, or not, medically considered; and other similar questions determinative of whether respondent's treatment was scientific and could be safely self-administered internally—are manifestly all questions of opinion, and nothing else.

The Commission has no power to determine whether any opinion is unsound, or as to which of two conflicting opinions is the sounder and better one. In the words of the lower court, speaking by Judge Denison (R. 476):

> "It [*i.e.*, "whether it is 'safe' for the public to buy and take Marmola"] is a matter of expert opinion, as to which there are as many shades and degrees as there are experts who discuss it, and as to which *a nonexpert board can hardly have been intended to be umpire.*"

The same consideration—that the Commission has no power to determine anything except questions of fact that can be resolved and supported by evidence—forbids that the Commission should determine the meaning of such words as *safe* and *scientific,* so as to bind the courts by the Commission's view as to the sense in which such words are used in any advertisement, or as to the sense in which they are understood by the persons to whom such advertisement is addressed. If a dispute arose as to the meaning of a word, which was of such a character that it could be resolved only by hearing evidence in that regard,—*e.g.*, a dispute as to the meaning of a technical term, or as to the meaning of a word in a particular locality, or among a special class of people, in which or among whom it was contended that the word had acquired a generally understood secondary signification,—perhaps a finding by the Commission in respect of such a dispute, if made after hearing evidence and if supported by substantial competent evidence, would bind the courts. But that is the limit of the Commission's power in respect of determining—for anybody except itself—the meaning of any word, or the sense in which such word is used in a given advertisement, or is understood by the readers of such advertisement.

As the lower court said, in substance, in the case at bar, the meaning of a word in general use,—such as the words *scientific* and *safe,*—which has no absolute meaning, such as is possessed by a technical term, and is not claimed to have acquired a secondary signification, is essentially

a question of opinion. Judge Denison's language in that regard was (R. 473, 473-474, 475):

> "It is clear that the adjectives 'scientific' and 'safe' have ordinarily no absolute meaning (R. 473) . . . . We think that it [*i.e.*, the question of whether respondent's treatment, "in the environment of these advertisements, is or is not 'scientific'"] was at the beginning of the proceeding and continued to the end to be a matter of opinion; and, in final analysis, a matter of *opinion as to what definition of the word* [scientific] *was more appropriate* to the circumstances. The same conclusions prevail in the matter of 'safety" (R. 473-474) . . . . . Any study of the evidence, however casual or however thorough, leads to and compels the conclusion that the whole subject of 'safety' stands upon the same basis as that of 'science'" (R. 475).

The same consideration—that the Commission has no power to determine anything except questions of fact—requires the conclusion that the Commission had no power to determine that the respondent had advertised its treatment as safe at all for self-administration internally. The determination that the respondent had so advertised its treatment, was essentially a determination of law, not of fact.

Such conclusion follows from the fact that the respondent had never made any express representation that its treatment could safely be self-administered internally; and from the further fact that the only representation that could be imputed to respondent at all, in respect of the safety of self-administering its treatment, arose by implication from respondent's advertising its treatment for sale, as one to be self-administered internally.

To deduce from the fact that a vendor advertises his product as one to be consumed by human beings, the

inference that, by so advertising, he thereby represents that it may be consumed, not only with some degree of safety, but with precisely what degree of safety, and by whom, and under what circumstances, is a deductive process that has an assertion of law for its major premise. It is not a direct and immediate inference from the bare words of the advertisement alone. And the Commission lacks power to make any binding deduction, or to draw any binding inference, that rests upon an assertion of law as its premise. The Commission, as a non-expert board, cannot declare, so as to bind anybody but itself, what are the implications of an advertisement, so far as they arise not alone out of the words used, considered in isolation from the law, but also out of the general rules of law that lie back of the advertisement. The determination of the legal effect of an advertisement—of what representations, and what representations only, an advertisement must be understood to make, not by reason of its express words alone, but also because the law is what it is—is for the courts exclusively.

The question of the power of the Commission to settle disputes as to matters of opinion, and to deduce conclusions as to the representations that are made by advertisements, when such conclusions rest upon premises of law, is not discussed explicitly in the Commission's brief. But perhaps the impression that is given by the brief as a whole, is that, in the Commission's view, if the Commission finds the statements in an advertisement to be false and misleading, that is the end of the matter, so far as the courts and everybody else are concerned,—regardless of whether such statements are not express but arise only by implication of law; and regardless, also, of whether such statements are false and misleading, not because they are fraudulent misrepresentations of facts, but merely because they embody opinions that the Com-

mission considers unsound and likely, if adopted, to lead the person adopting them to do things that the Commission believes will cause him to spend his money unwisely and to injure his health.

Such view, which the Commission appears to hold, it is respectfully submitted, is wholly untenable.

V.

IF THE TERM "UNFAIR METHODS OF COMPETITION IN COMMERCE" CAN, UNDER ANY CIRCUMSTANCES, INCLUDE THE PRACTICE OF PUBLISHING ADVERTISEMENTS IN NEWSPAPERS AND MAGAZINES,—WHICH IS DENIED,—SUCH TERM CANNOT INCLUDE SUCH PRACTICE UNLESS THE ADVERTISEMENTS PUBLISHED ARE NOT MERELY FALSE AND MISLEADING, BUT ARE FRAUDULENT.

It is urged in a succeeding division of this argument that—for reasons there stated—the publishing of advertisements in newspapers and magazines cannot fall within the term "unfair methods of competition in commerce", under any circumstances, regardless of the character of the advertisements, whether fraudulent or not.

But, howsoever that may be, it is here respectfully submitted that, at the very least, an advertisement must be fraudulent, before the publication of it can possibly be said to be an "unfair" competitive method. The making of statements that, although they are inaccurate and are made designedly and not inadvertently, nevertheless do not appear to have been made with any actual or imputable intent to deceive, does not constitute the using of any "unfair method of competition in commerce".

That advertisements must be more than just merely false and misleading, and must be fraudulent—characterized by bad faith and an intent to deceive—before the practice of publishing them can be an "unfair method of

competition in commerce", is the direct inference from the language that is quoted hereinabove from the *Gratz case* (253 U. S. 421),—to the effect that the words "unfair method of competition" in commerce are "clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression", etc.

The misbranding that was involved in the *Winsted Hosiery case* (258 U. S. 483), was fraudulent; in the majority opinion, the misbranded product was characterized as an "*unlawful* instrument" and "*dishonest* goods" (p. 494), and reference was made to "the *fraud* which they [misbranded goods] perpetrate" (p. 493).

In *Sinclair Refining Co.* v. *Federal Trade Commission* (1921), 276 Fed. 686, (C. C. A. 7); affirmed (1923), 261 U. S. 463, Judge Page, for the lower court, said at pages 687, 688:

> "The jurisdiction under section 5 [of the Trade Commission Act] exists only where there are practices that amount to a *fraud* in regard to some public or private right; otherwise, they do not, in our opinion, as we said in the *Kinney-Rome case, supra* [275 Fed. 665], amount to an unfair method of competition . . . . . We are of opinion that Congress did not intend . . . . . to do more than to eliminate the almost infinite variety of *fraudulent practices* from business in interstate commerce."

The *Kinney-Rome case* (275 Fed. 665) is quoted hereinabove.

Fraud and perfidious dealing were, and still are, essential to the existence of "unfair competition", in the sense in which alone, prior to the adoption of the Trade Commission Act, the term "unfair competition" was com-

monly used in the law, *i.e.*, to designate "palming off" of one sort or another. *Elgin National Watch Co.* v. *Illinois Watch Co.* (1901), 179 U. S. 665, 674; *Lawrence Mfg. Co.* v. *Tennessee Mfg. Co.* (1891), 138 U. S. 537, 549; *Queen Mfg. Co.* v. *Isaac Ginsberg & Bros.* (1928), 25 Fed. (2d) 284, 288 (C. C. A. 8).

It is not using any "unfair method of competition in commerce", to label or to advertise veneered furniture, merely as "mahogany" or as "walnut", without the use, as an accompanying qualifying term, of the word "veneered", or of some other word that would be adequate to indicate that such furniture was not made solidly and throughout of mahogany or walnut,—although the lack of some such modifying word might result in misleading grossly uninformed persons, but would not mislead the more enlightened. *Berkey & Gay Furniture Co.* v. *Federal Trade Commission* (1930) 42 Fed. (2d) 427, 430, (C. C. A. 6). Neither does it constitute using any "unfair method of competition in commerce", to use a subscription blank, of such character that it might mislead a very stupid person into erroneously believing that he was to pay for only certain articles that were mentioned in such blank, and was to get other articles mentioned therein free of charge, but would not mislead a person of ordinary intelligence into such erroneous belief. *John C. Winston Co.* v. *Federal Trade Commission* (1925), 3 Fed. (2d) 961, 962, (C. C. A. 3). Neither does it amount to using an "unfair method of competition in commerce", to make merely exaggerated statements concerning merchandise, even though they be greatly exaggerated and might mislead the credulous or the literal-minded, if they do not go so far as to misrepresent the real character of the merchandise, but are mere puffing statements. *Ostermoor Co. Inc.* v. *Federal Trade Commission* (1927), 16 Fed. (2d) 962, 963, (C. C. A. 2).

In view of the authorities above cited, it is respectfully submitted that advertisements must be fraudulent, and not merely innocently false and misleading, in order that publishing them may be deemed to be using any "unfair method of competition in commerce"; and that the fraudulent character of the advertisement must stand in a causal relationship, through deceiving and inducing the public to that substantial injury to competition, or to the competitors of the advertiser, which has been shown in a preceding division of this argument to be indispensable to a conclusion that any competitive act, howsoever reprehensible, may constitute an "unfair method of competition in commerce".

VI.

IF THE TERM "UNFAIR METHODS OF COMPETITION IN COMMERCE" CAN, UNDER ANY CIRCUMSTANCES, INCLUDE THE PRACTICE OF PUBLISHING ADVERTISEMENTS IN NEWSPAPERS AND MAGAZINES,—WHICH IS DENIED,—THEN THE ADVERTISEMENTS THAT RESPONDENT PUBLISHED DO NOT FALL WITHIN SUCH TERM, BECAUSE SUCH ADVERTISEMENTS (1) WERE NOT FRAUDULENT AND (2) THEY WERE NOT INJURIOUS TO COMPETITION, OR TO RESPONDENT'S COMPETITORS.

It has been shown, in preceding divisions of this argument, that if respondent's act in publishing advertisements in newspapers and magazines could, under any circumstances, constitute using an "unfair method of competition in commerce",—which is denied in a succeeding division of this argument,—such act on respondent's part could have such effect, if and only if two facts should coexist, namely: (1) that the advertisements that respondent published were fraudulent, and (2) that the publication of such advertisements was injurious, by reason alone of the fraudulent character of the advertisements, to competition, either directly, or indi-

rectly through the medium of injuring competitors whether by lessening their market, or by taking their customers away from them and thereby weakening their competitive strength, or by some other means.

It is respectfully submitted, both (1) that the advertisements that respondent published, were not fraudulent; and also (2) that the publication of such advertisements was not injurious to competition or to respondent's competitors.

(1) Respondent's advertisements were not fraudulent:

The two representations that were made by respondent in the case at bar, do not stand altogether upon the same footing, in certain particulars, so far as concerns the question of whether they were fraudulent or not.

The first of such representations—namely, the representation, in substance, that respondent's Marmola treatment for the reduction of excessive fat is scientific, at which representation the first three paragraphs of the Commission's order to cease and desist (R. 26-27) are leveled—was made expressly in respondent's advertising matter.

Such representation as respondent made in its advertisements, in respect of its treatment being scientific, are of small importance to respondent, and, it may be surmised, of small importance to the Commission, or anybody else. In the nature of things, it appears doubtful that respondent's advertising its treatment as scientific, ever contributed to the sale of a box of its tablets; and doubtful that respondent would ever miss selling a box of its tablets, as a result of its discontinuing—if it should discontinue—to advertise its treatment as scientific; and doubtful that the Commission would ever have instituted its proceeding, for the purpose only of forbidding that respondent should

advertise its treatment as scientific. The word *scientific* has been too much abused, for anybody to become very seriously concerned or surprised at, or deceived by, its being applied to anything,—as appears from the fact that it is not uncommon to hear, or even to read, that a pugilist either has, or lacks, "science" in his boxing. To think of a word that, in common usage, is more nearly meaningless than is *scientific,* would not be easy.

Such representation as respondent made in its advertisements as to its treatment being scientific, cannot, as a matter of law, properly be regarded as possessing the capability of being anything more reprehensible, at the worst, than an example of what was referred to in the *Ostermoor case* (16 Fed. (2d) 962, 963), *supra,* as "The time-honored custom of at least merely slight puffing", which, it was there said, "unlike the clear misrepresentation of the character of goods, ... has not come under the legal ban". Such representation cannot properly be regarded as fraudulent, under any circumstances.

Respondent never made expressly, in its published advertisements or otherwise, the second representation that the Commission charged respondent with having made, and found that respondent had made, by its advertisements,—namely a representation, in substance, that respondent's Marmola treatment, for the reduction of excessive fat, could be safely self-administered internally. It is against such supposed representation that the last three paragraphs of the Commission's order to cease and desist are directed (R. 26-27).

The only representation that respondent ever made that its treatment could be safely self-administered internally at all, was made by implication. The advertising by respondent of its Marmola tablets for internal administration, doubtless carried the implication that respondent's tablets could be self-administered internally, by somebody,

under some circumstances, with a degree of safety. But the fact that respondent advertised its tablets for internal administration, did not raise any implication, or justify any inference on anybody's part, that respondent's tablets —any more than corned beef and cabbage, or pork and beans—could be self-administered internally, with absolute safety, by everybody and anybody indiscriminately,—by the fat and the lean, the infant in arms and the centenarian, the sick and the well, alike,—in any and every quantity, under any and all circumstances.

Respondent's advertisements were addressed to the excessively fat (R. 425-435, and 388; Comm. Exs. 6, 7, 8, 9, R. 65 and 2; Comm. Ex. 9, R. 108 and 2; Comm. Exs. 10, 11, 12, R. 109-110 and 2). The implication of respondent's advertising its tablets for internal consumption did not go beyond a representation that respondent's tablets could be self-administered internally, in accordance with the instructions supplied by respondent in that behalf, with reasonable safety, under usual and ordinary conditions and circumstances, by the usual, ordinary, and average excessively fat person.

In accordance with the implication of its advertisements, respondent stated expressly, in the printed booklet of instructions that it supplied inside each retail package of its tablets (Comm. Exs. 2 and 3, D. 42-44, and 2; R. 417-424, and 388), that respondent's tablets were intended for the "average person" (R. 422), with the "average case" (R. 418, 422) of excessive fatness. And in such booklet respondent said, to the person contemplating the taking of respondent's tablets, "Consult your own physician if you want special advice in any unusual condition" (R. 422).

The lower court adopted, in substance, the view that is above set forth, as to the implied representation that respondent made by its published advertisements, in

respect of the safety of the self-administration internally of respondent's Marmola tablets. Thus Judge Denison said in that regard (R. 474, 475, 477):

> "The Raladam Company advertised that Marmola tablets were safe to take. It is difficult to see that the form of his [this] representation, so long as it is merely general, is of much importance. Within wide limits, there would be an implied assurance of safety in taking any food or drug placed on the general market; but the assurance, whether expressed or implied, would always need construction and could mean only, while kept in general terms, that if it were used reasonably, or in accordance with instructions, it would be reasonably safe (R. 474) .... people who have hyperthyroidism, or tuberculosis, or any other specified disease where thyroid extract would be contra-indicated, are not usually looking for obesity remedies; they are already too thin; the advertisement is not to or for them (R. 475) ..... The ..... results produced by too much thyroid are those which are generally called nervousness, including over-tension, loss of sleep, etc. Whenever these unusual conditions develop, the directions are to stop the treatment and consult a physician (475) ..... Petitioner says to the public, whether the statement happens to be in a printed form or orally, that this remedy is safe to be taken according to directions by the average person" (R. 477).

The Commission, in its brief (pp. 35-36), cavils at what the lower court thus said, in the next to the last sentence in the excerpt from the lower court's opinion that is just above quoted. The Commission's criticism—that the "directions" by respondent, to which the lower court referred as above quoted, did not explicitly direct that anybody who should develop symptoms of having taken too much thyroid, should stop taking Marmola tablets—is not entitled to be taken very seriously, in view of the fact that

the Commission's own witness (Dr. Elliott) testified, in substance, that the symptoms of over-dosage with thyroid are disagreeable, and that anybody that developed such symptoms would be likely to stop taking thyroid and go to a doctor about his symptoms, without being directed to do so (R. 98-99).

It is not, however, understood that the Commission seriously objects to the interpretation that the lower court put upon respondent's advertising matter, or to the limits which the lower court, as last above quoted, imposed upon the implied representation as to safety that was to be drawn from the respondent's having advertised its tablets for human consumption.

There is reason to believe that the Commission hardly expects this court to examine and interpret all of the respondent's advertisements that are shown by the evidence. In the "Supplemental Memorandum" that the Commission filed, in connection with its petition for certiorari, the Commission said (p. 1): "We submit that it is unnecessary for the court to examine the exhibits [where, alone, respondent's advertisements could be found (R. 2, 65, 108, 109-110, 388)]. They were introduced before the Federal Trade Commission to show what representations the respondent made in its advertisements. The nature of those representations cannot be disputed." The Commission, in its latest brief, appears to wish to get away from that statement in its "Supplemental Memorandum"; in its latest brief (e. g., at pages 37 to 38), the Commission appears to wish to discuss the truth or falsity of certain express representations in respondent's advertisements, of trivial importance to anybody, which the Commission did not even charge to be false in its complaint and did not even refer to in its findings. But it is believed that such course cannot properly be adopted.

Having regard for the foregoing considerations, the Commission's findings (R. 23) to the effect that respondent advertised that the "medical properties" of its Marmola treatment were "safe, pleasant and effective in their action in the removal of excess flesh from the human body" and that such treatment might "be used by purchasers thereof without discomfort, inconvenience or danger of harmful results to the users thereof", must be taken to mean what the lower court took them to mean,—namely, that respondent impliedly advertised, by offering its treatment for sale, that its treatment could be self-administered, internally, by the class of persons to whom it was offered,—average excessively fat persons—with reasonable safety, under usual and ordinary conditions and circumstances. Otherwise, the Federal Trade Commission's findings must be regarded as not supported by any evidence at all. There is not a shred of evidence anywhere in the record that tends even remotely to support such findings, if they are taken to mean that respondent expressly advertised its tablets as safe at all, or that it impliedly advertised them sweepingly as intended to be taken, and safe to be taken, by everybody indiscriminately.

Taking the implied representation that was made by respondent by its advertisements, in respect of the safety of the self-administration of its tablets internally, as having been of only the limited scope that the lower court attributed to it,—namely, as having been, in substance, nothing more than a representation by respondent that its tablets could be self-administered internally, according to directions, by the average excessively fat person having an average case of excessive fatness, with reasonable safety, under usual and ordinary conditions and circumstances,—there is no substantial evidence in the record to show that such implied representation was even untrue, to say nothing of its having been fraudulent. The lower court

said, in substance, that there was not any substantial evidence to show, nor any finding, that the self-administration internally of respondent's tablets, by an average excessively fat person, would not be reasonably safe. Judge Denison's language in that regard was (R. 477):

> "Before leaving the subject of 'safety', it should be pointed out that there is no finding, nor any evidence, that any substantial part, or any particular part, of that public to which these statements are addressed, the obese public, the average or usual or ordinary obese person, would be reasonably likely to be harmed by the advised use of these tablets. The fair inference is that the actual harm would be occasional and rather exceptional. There is only the chance that the user may be of the exceptional class; upon that contingent basis rests the finding of general danger."

In this aspect of the record, the inescapable conclusion is that, so far as concerns the implied representation that was made by respondent in respect of the safety of self-administering its tablets internally, the Commission's finding (R. 24) that "Said statements and representations made by respondent in said . . . . . advertisements . . . . . have the tendency and capacity to mislead and deceive the purchasing public", etc., goes for nothing.

The foregoing considerations sufficiently establish that neither of the representations that are here in controversy, made by respondent, was fraudulent. And that conclusion is fortified by additional considerations, now to be noted.

Such additional considerations are, in brief substance, these: that, as has been shown in a preceding division of this argument, respondent's representations, made or implied in or by its published advertisements,—to the effect that its treatment was scientific and could be safely self-administered with reasonable safety by the excessively fat

under usual and ordinary conditions and circumstances,—, were representations as to matters of mere opinion; that an honest representation as to a matter of mere opinion, does not constitute using "any unfair method of competition in commerce", even though the opinion that is expressed in such representation be not generally accepted as sound by persons that ought to know, but be a dubious and debatable one; and that the making of a representation as to a matter of mere opinion cannot constitute fraud or the using of an "unfair method of competition in commerce", unless the evidence shows that such representation was dishonestly made, in that the representor did not honestly entertain or believe in the opinion that he expressed, but misrepresented his true state of mind when he stated that he did entertain such opinion; and that there is neither any charge, nor any evidence, nor any finding, in the record, to the effect that respondent did not honestly believe that its treatment was scientific and could be safely self-administered internally, or that respondent acted dishonestly, and misrepresented its real belief and true state of mind, when it made its representations to that effect.

L. B. Silver Co. v. *Federal Trade Commission* (1923), 289 Fed. 985, (C. C. A. 6), establishes that the publication in advertisements of honest expressions of opinion is not fraudulent, and does not constitute using any "unfair method of competition in commerce", within the meaning of the Trade Commission Act. The matter of opinion there in question was whether, having regard for their genealogy and for the science of genetics, a certain sort of hogs, known as Ohio Improved Chesters or O. I. C. hogs, could properly be termed a different "breed" of hogs from, or only a new "strain" of, Chester White hogs. The court declined to enforce the Commission's order that forbade advertising O. I. C. hogs as a separate breed.

Judge Donahue, for the majority of the court (Judge Denison concurring in a separate opinion), said at pages 988-989:

> "There is also a sharp and irreconcilable conflict in the expert opinion evidence touching the question as to what constitutes a distinct and separate breed . . . . . One group of experts and breeders are of the opinion that there cannot be a distinct breed originated where the blood line goes back to the old foundation stock; that, while different strains or types may be developed in this way, it is nevertheless the same breed. Another group of breeders and experts are of the opinion that a distinct breed may be originated through selection and in-and-in breeding. Each of the individual members of these groups that have testified in this case or whose books on live stock breeding have been admitted in evidence, though differing in opinion based on the same state of facts, appears to be entirely honest, sincere and equally firm in the belief that his conclusion is the right one. The situation presented by this conflict of opinion among experts and breeders is fully discussed and its effect determined by the Supreme Court in the case of *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94 . . . . . It was also held by this court in the case of *Harrison* v. *U. S.* 200 Fed. 662, 665, 119 C. C. A. 78, 81, that *a scheme to defraud 'cannot be found in any mere expression of honest opinion'.*"

Seven Cases v. *United States* (1916), 239 U. S. 510, illustrates the only method by which the Commission can extend the power that it possesses in respect of preventing "unfair methods of competition in commerce," so as to enable it to suppress the expression in published advertisements of opinions of which it disapproves.

In *Seven Cases* v. *United States* (239 U. S. 510), the owner of certain proprietary medicine that had been

libeled, had branded or labeled such medicine so as thereby to represent that it would cure tuberculosis—an expression of opinion. Such owner had later admitted upon the record, by demurrer, that there was nothing that could be relied upon to cure tuberculosis. From such admission, it appeared that the owner could not honestly have held the opinion, at any time, that the medicine in question would cure tuberculosis; but that the owner had misrepresented his true state of mind,—a misrepresentation as to a matter of fact,—in expressing such opinion. The owner was held to have been guilty of fraudulently misbranding the medicine, Mr. Chief Justice (then Mr. Justice) Hughes saying, for the court, at pages 517-518:

> "It is said that the owner has the right to give his views regarding the effect of his drugs. But state of mind is itself a fact, and may be a material fact, and false and fraudulent representations may be made about it; and persons who make or deal in substances, or compositions, alleged to be curative, are in a position to have superior knowledge and may be held to good faith in their statements."

If the Commission should wish to make an effectual order commanding that a person being proceeded against should cease and desist from publishing in his advertisements any opinion of which the Commission disapproved, the course that is open to the Commission,—in the light of *Seven Cases* v. *United States* (239 U. S. 510),—and the only course that is open to it, would be for the Commission, first, to issue a complaint stating that such person had expressed such opinion, and that he had not actually and in fact believed in it, but had misrepresented his true state of mind in expressing it, and in representing that to be his opinion which in truth was not; and then next, for the Commission to find, as a fact, that the person being

proceeded against had misrepresented his true state of [illegible] as charged.

It is not, however, necessary to pursue this topic farther; because there is neither any charge nor any evidence that the respondent in the case at bar acted in bad faith, or dishonestly, or fraudulently in publishing in its advertisements its opinion to the effect that its Marmola treatment is scientific and is susceptible of being safely self-administered internally. There is neither any charge, nor any evidence, that respondent did not honestly entertain such opinion, or that it misrepresented its true state of mind when it expressed such opinion. And in that connection, Judge Denison, speaking for the lower court, said (R. 472):

> "There is, in the petition filed by the commission, no claim that the representations as to science and safety, were fraudulent and not made in good faith, or were so obviously and clearly unsound that they could not plausibly be held by any intelligent person. There being no issue as to fraud or bad faith, no proofs were taken on either side and such suggestions as are now made with that aspect must be disregarded."

And the lower court further said (R. 476), in substance, that under the pleadings and proofs, the case at bar was not within the doctrine of *Seven Cases* v. *United States* (239 U. S. 510), *supra*, and other cases of the same class. "We cannot see in these cases", said Judge Denison, "any particular bearing on the question here" (R. 476).

The Commission's brief appears not to be very explicit, upon the question of whether or not the Commission has power to suppress expressions of opinions in published advertisements, even though the opinions expressed are not fraudulent, in the sense illustrated by *Seven Cases* v.

United States (239 U. S. 510), but are merely, in the Commission's view, unsound and dangerous and likely to mislead members of the public into doing acts that the Commission thinks would not be good for them. It is perhaps a fair inference, however, that the Commission considers that it has such power. Such inference arises from the Commission's avoidance of the use of the word *fraud* in its brief; and from what is said on pages 38 and 39 of its brief; and from the frequent recurrence in the Commission's brief of expressions that are of the same import as the following, which appears at page 18 of the Commission's brief: "We submit that the real issue is whether respondent's advertisements tended to mislead and deceive a substantial part of the purchasing public. The Commission found that they did have such tendency."

Some of the statements that are made in the Commission's brief (*e. g.*, at page 35), indeed suggest that, in the Commission's belief, the obligation of veracity that rests upon an advertiser is greater than that which rests even upon a witness under oath,—that an advertiser must tell the truth not only so far as he is interrogated, but to the full extent that he can ascertain what it is; and that if he knows that people disagree about the merit of his product, he must advertise that fact to the public, and may not put his best foot foremost by advertising only the view that is favorable to his product, notwithstanding that he honestly entertains such view, and that a large part of the people that are qualified to judge, agree with him.

Misleading and deceiving may, of course, be innocent; many persons consider that Darwin did engage, and that Einstein is now engaged, in misleading and deceiving the people of the world, to the great unhappiness of many of

them, and perhaps to the great financial loss of many useful institutions, about a matter that is of paramount importance to everybody,—namely, as to the true nature of things, with reference particularly to the origin and genesis of human beings and the finiteness or infiniteness of the universe.

It is not generally supposed, however, that Darwin did, or that Einstein does, act fraudulently in conceiving, developing, and putting forth their respective works. But the Commission appears, inferentially, to think that such consideration is a matter of no consequence; and that the Commission, if it should see fit, could issue an order that would be valid, commanding an interstate bookseller to cease and desist from advertising, if he should advertise, *The Origin of Species*, in newspapers and magazines of interstate circulation, as containing a true, veracious, and irrefutable explanation of the origin and genesis of mankind,—even if, by chance, the bookseller might actually believe that such was the real character of that book. Inferentially from the Commission's brief (p. 35) a bookseller could be prevented by the Commission—in the interest of avoiding any misleading or deceiving of the public—from saying more in an advertisement about such book, than that some think the book an expression of the truth, and some think it false; that some think it interesting and enlightening, and some think it dry, stale, and unprofitable; that it leads some people to a more zealous adherence to the book of Genesis, and turns others towards vitalism and other pagan notions; and that the bookseller cannot characterize the book, one way or the other, because he himself is without personal knowledge of whether it embodies the truth or merely the inspiration of the devil.

It is thought that the law is not that which the Commission inferentially appears to think it to be; that the

law is not that the Commission is empowered to shepherd the public and protect it from being misled and deceived,—or from what the Commission, in its wisdom, happens to believe is misleading and deceiving,—apart from all considerations of whether the misleading and deceiving is fraudulent or otherwise.

We think it not germane to consider whether respondent's published advertisements did, or did not, contain any false statements of fact,—as distinguished from expressions of opinion,—or to go outside the Commission's complaint (R. 2-6), its findings (R. 21-25), and its order (R. 26-27). The complaint, the findings, and the order do not cover, or purport to cover, the statements that are contained in the excerpts from the respondent's booklet that appear at pages 36 and 37 of the Commission's brief. We do respectfully submit, however, that the statement on page 37 of the Commission's brief,—that "The [lower] court unduly simplified the case when it referred only to the words 'safe' and 'scientific' ",—is not sustainable by the record. If anybody "unduly simplified the case", which is respectfully denied, it was the Commission, and not the lower court, that did it,—such simplification having been finally and fully accomplished by the Commission's order to cease and desist (R. 26-27), the first three paragraphs of which forbid respondent's predicating the attribute "scientific", of its treatment, and the last three, the attribute "safe".

The foregoing considerations, it is respectfully submitted, sufficiently establish that, as a matter of law, the representations that were made or implied by respondent's advertisements,—to the effect that its treatment was scientific and could be safely self-administered internally,—were not fraudulent; and that, therefore, the publishing of such advertisements did not constitute using any "unfair method of competition in commerce".

(2) Respondent's advertisements were not injurious to competition or competitors:

The Commission made a finding as follows (R. 22):

> "The respondent in the course and conduct of its business aforesaid, is in competition with other persons, partnerships or corporations in and throughout the several States of the United States, who are likewise engaged in offering for sale and selling printed professional advice, books of information and instruction, and other methods, means, remedies and appliances for dissolving or otherwise removing excess flesh of the human body."

The Commission announced, as a conclusion (R. 25), that the publication of respondent's advertisements was "to the prejudice of the public and respondent's competitors".

The Commission however failed to adduce, and the record does not contain, any substantial evidence to support its above quoted finding. Neither is there any evidence to sustain its above mentioned conclusion, in its application to respondent's competitors; and whether there is any basis upon which to sustain its conclusion in its application to the public, will be considered in a subsequent division of this argument.

The lower court did not declare explicitly that the Commission's above quoted finding is not supported by any substantial evidence. The lower court did however say, in substance, that the question whether respondent had any competition or any competitors was "left very vague" by the evidence. Judge Denison's language in that regard, was (R. 479):

> "The other possible beneficiary is found in the list which the American Medical Association Bureau

> has made up, comprising a number of other commercially exploited remedies for obesity, which have been advertised or found in the drug stores within recent years. Some of them are *perhaps* still being sold in substantial quantities, though that is left *very vague.*"

As the decision in *Federal Trade Commission* v. *American Tobacco Co.* (1927), 274 U. S. 543, is understood, it is apprehended that this court will accept the view that was taken by the lower court, as to the dubious character of the evidence that is relied upon by the Commission to establish that respondent had competition and competitors. In the case last above cited, the Commission had charged, and had found, that the American Tobacco Company had become a party to a combination of tobacco dealers to maintain prices, but the Court of Appeals had considered that there was nothing to support that view.

Mr. Justice McReynolds, speaking for the court, said at page 544:

> "It now appears to us that this matter of fact is of no general importance. Accordingly, we adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations. And upon that ground alone we affirm the judgment below."

It is respectfully submitted that if this court shall find it necessary to consider the question, this court will come to a conclusion, upon examining the record, that there is no substantial competent evidence to sustain a conclusion that respondent had any substantial competition in selling proprietary medicinal internal antifat treatments.

No competitor of respondent appeared before the Commission as a witness to complain that respondent's advertisements were injurious to him in his business, or injurious to competition in the field of antifat treatments; or to complain that such advertisements were fraudulent, or otherwise objectionable. The role of complaining witness, in the proceeding before the Commission, was occupied by Dr. Arthur J. Cramp (R. 110-113, 130-134, 159-170), who was given some assistance in seeking to establish that respondent had competitors, by Dr. Lyman F. Kebler (R. 183-184). Dr. Cramp, when he testified (on July 26th and July 27th, 1928), was the Director of the Bureau of Investigation of the American Medical Association (R. 111), and had his office with the American Medical Association (R. 110).

Dr. Cramp undertook to testify that respondent had competitors, and, on his first appearance as a witness (July 26th), read into the record a long list of such supposed competitors (R. 111-112, 130). He then testified, also, that he had recently theretofore purchased in drug stores in "The Loop" in Chicago, five different antifat treatments, other than respondent's, and that he could have purchased a sixth, if he had been willing to pay $6.00 for it (R. 112). Cross-examination developed, however, that Dr. Cramp had compiled the list that he had read into the record, from the files and records of the Bureau of Investigation of the American Medical Association (R. 130-131, 132), which makes a practice of searching newspapers, in large numbers, for advertisements of patent medicines and proprietary medicines (R. 165), and of writing letters, under assumed names, to proprietary medicine concerns as to the products of which it wishes to obtain information (R. 168). And cross-examination developed, further, that Dr. Cramp did not have any per

sonal knowledge that any of the many concerns that he had sworn were competitors of respondent, were in business at all at the time when he testified (R. 131-132, 167); and that he did not know how long the five antifat treatments that he had testified to having purchased, had been on the shelves of the respective drug stores from which he had purchased them, and that articles sometimes remained on the shelves of drug stores for years before being sold (R. 131, 132, 133, 165-166).

Dr. Cramp's first performance as a witness was, inferably, not satisfactory to the Commission. Dr. Cramp accordingly reappeared as a witness the next day (July 27th), in an effort to give some competent testimony that respondent had competitors (R. 159). He then testified, of his own knowledge, to the existence of three antifat treatments,—one put out by the O. B. C. T. Laboratories, which concern was very anxious to sell its product; the second, Venus Reducing Cream; and the third, Nature's Way Reducing Cream (R. 159, 160, 161). Those were the only ones, as to the then existence of which he had been able to obtain personal knowledge, in the course of twenty-four hours (R. 161). Also, Dr. Cramp then produced what purported to be advertisements that had been clipped from newspapers (R. 161), printed between February and May, 1928. Such clippings, Dr. Cramp testified had been sent in to the Bureau of Investigation of the American Medical Association,—one of them by the Boston Better Business Bureau (R. 163, 164). The source of origin of the others was left vague. Such purported advertisements related to what Dr. Cramp testified were antifat treatments, known respectively as Fayro, (R. 162); Kellogg's Rational Treatment for Obesity (R. 162, 160, 168); Rite-Wate Vegetable Compound (R. 162, 165-167); O'Slend'O (R. 162, 168); and Pyro-Pine Reducing Bath (R. 162-164).

Dr. Cramp did not testify as to the nature of any of the antifat treatments that he named, as to whether they were medicinal and intended to be used internally, or not. Two of them inferably, from their names, were salves; another, was a bath salt, and the remainder (except perhaps the Rite-Wate Vegetable Compound) were of a nature not indicated at all, by their respective names or otherwise. Nor did Dr. Cramp tell how, or wherein, he supposed that such treatments competed with respondent's treatment, or respondent's treatment with them, or any of them.

Dr. Kebler testified that the Kellogg treatment was a medicine; mentioned a treatment, called "Fat-off", as to which he said that he did not know whether it was being produced or not; and mentioned treatments called "Take-off", "Rite-Wate" (inferably the same one as to which Dr. Cramp had testified), and Dr. Newman's, respectively, which he said were being sold (R. 183-184).

The net result of the testimony of the two physicians appears to have been that of proving the existence of one medicinal antifat treatment, other than respondent's Marmola Treatment,—namely, Kellogg's Rational Treatment; and to prove the existence of another treatment, Rite-Wate Vegetable Compound, the medicinal character of which is possibly inferable from its name; and to show the existence of certain other treatments (aside from "creams" or salves), as to the nature of which, and as to whether they probably did or did not compete with respondent's treatment, the record supplies no information beyond what might serve as a basis for a pure guess.

Respondent's general manager (R. 32) testified, on July 24, 1928: "I do not know of any internal [obesity cures] selling through the trade at this time. There is some bath salts for the reduction of flesh" (R. 66). He testified,

further, that he had no knowledge that an institution at Battle Creek, run by Dr. Kellogg, sold any cure for obesity (R. 66-67); or that MacFadden sold advice for the reduction of flesh in the Physical Culture Magazine (R. 67); or that there were any mail-order concerns that were then selling antifat treatments (R. 67). He added: "There was a million of them some years ago, but I do not know where they are. There are people who have got machines, you know, peddling them for reducing flesh" (R. 67). And he testified further: "I had a lot of competition a few years ago. I have not any now. I say I have not any now. I have, but I do not know who they are..... That is, in taking internal—" [*i.e.*, competitors in vending medicinal treatments for internal administration] (R. 68).

There is not, it is believed, any other testimony than the foregoing, in the record, tending to show that respondent had any competitors. May such testimony be fairly said to be substantial evidence of the existence of any substantial—indeed, of any appreciable—competition, in the field of selling proprietary medicinal antifat treatments intended for self-administration? Does such testimony constitute an adequate basis upon which to predicate that injury to competition, or competitors, which, as has been seen, is indispensable to the existence of an "unfair method of competition in commerce"? May the Commission build up a case and destroy any business,—howsoever worthy of destruction such business may be deemed by some, or by many, to be,—on the basis of nothing more substantial, in the way of proof of competition and competitors to be protected against the use of "unfair methods of competition in commerce", than the testimony above noted?

The Commission, it is respectfully submitted, is asking the courts to stop the respondent from advertising its treatment as safe for self-administration internally otherwise than under medical surveillance, largely on a basis of guesswork.

The Commission produces no evidence that respondent's treatment ever injured anybody. It asks the courts to guess, first, that respondent's treatment is unsafe for self-administration, because five physicians say so,—notwithstanding that six say to the contrary.

The Commission asks the courts to guess next, that respondent's newspaper and magazine advertisements induced a number of persons—under the *Winsted Hosiery case* (258 U. S. 483, 493), it must have been a "substantial portion of the purchasing public", in order to be of any materiality—to buy respondent's treatment. There is not a shred of affirmative evidence that respondent's advertisements ever induced anybody to do anything,—whether to buy respondent's tablets, or merely to begin thinking about the advisability of getting rid of excessive fat in some way, or anything else.

To determine from the record whether respondent's advertisements ever had any effect at all, is wholly a matter of guessing. Persons with long and specialized experience in the advertising business, if supplied with full information as to fluctuations in respondent's sales and a history of the amount and different kinds of advertising that respondent had done from time to time, might perhaps be able to make an intelligent, expert guess, as to whether or not respondent's advertisements in newspapers and magazines had probably induced people to buy respondent's tablets, and possibly to guess approximately how many people such advertisements had probably so

induced. Nobody else could do better than to indulge in mere wild speculation about such question.

Why should not the Commission be required to make some kind of proof,—the best and most persuasive proof that can be applied to such an issue,—as to how many purchasers were probably induced to buy Marmola tablets by advertisements that were published in newspapers and magazines, and how many were induced to buy by other forms of advertising, or by other means than advertising? Why should the courts be asked just to guess blindly about that sort of a question?

The Commission next asks the courts to conclude, on the slender basis of the testimony above noted, that respondent had competition in the field of selling proprietary antifat treatments; and then to guess that such persons as the courts may surmise were induced, by respondent's advertisements in newspapers and magazines, to buy respondent's Marmola tablets, would otherwise,—except for such advertisements,—have bought some of the fat-removing agents that are mentioned in the above noted testimony, whether a medicinal treatment, or a fat-reducing machine, or what not, and that respondent's advertisements accordingly lessened the market for such articles and took away customers from the vendors of such articles.

The possibility that advertising respondent's treatment could possibly take patronage away from vendors of salves, bath salts, or machines appears to be remote. Such commodities are too unlike respondent's treatment.

The only shrewd guess, it is respectfully submitted, as to who were respondent's competitors, and whose market was lessened, and who if anybody lost patronage by reason of the publication of respondent's advertisements, is to surmise that physicians were the only real competitors

that respondent had, and that it was only the members of the medical profession alone, if anybody, that found their market lessened, and their patronage reduced, by reason of the publication of respondent's advertisements. Such conjecture accords with the activity as a witness, shown by the record, on the part of Dr. Cramp,—which can hardly be supposed to have been altogether altruistic; and with the complete lack of participation in any capacity, in the proceeding before the Commission, of any maker or vendor of any proprietary medicine, fat-reducing salve, bath salt, or fat-reducing machine.

It is superfluous to observe that the members of the medical profession, in practicing medicine, are not engaged in interstate commerce at all, and are not competitors of respondent in interstate commerce, and are not entitled to be protected by the Commission against "unfair methods of competition in commerce" on the part of respondent, or of other vendors of proprietary medicine, or of anybody else.

In the light of the foregoing considerations, it is respectfully submitted that because there is no substantial proof that respondent had any substantial competition, or any competitors,—as well as because, as shown above, the respondent's advertisements were not fraudulent—respondent must be held not to have been guilty of using "any unfair method of competition in commerce" in publishing such advertisements in newspapers and magazines.

VII.

THE PUBLICATION OF ADVERTISEMENTS IN NEWSPAPERS AND MAGAZINES CANNOT AT ALL, UNDER ANY CIRCUMSTANCES, CONSTITUTE THE USING OF ANY "UNFAIR METHOD OF COMPETITION IN COMMERCE".

This court never—so far as has been discovered—has expressed itself, directly and explicitly, upon the question whether the publication of advertisements in newspapers and magazines may, under any circumstances, constitute such an "unfair method of competition in commerce" as the Commission has power to prevent.

Perhaps a process of reasoning by analogy from the *Winsted Hosiery case* (258 U. S. 483), leads to a conclusion that, inasmuch as a practice of fraudulently misbranding merchandise was condemned in that case as an "unfair method of competition in commerce" that it was within the power of the Commission to prevent, therefore, a practice of fraudulently advertising merchandise in newspapers and magazines must also be such an "unfair method of competition in commerce" as lies within the scope of the Commission's regulative power.

Reasoning by analogy is often weak. Often there is no true analogy, but only a superficial appearance of one. And there are manifest points of possible fundamental difference between the respective practices of fraudulently misbranding merchandise, and fraudulently making false statements in newspaper and magazine advertisements concerning merchandise, so far as concerns the question of the right of the Government to exercise preventive control with reference to such practices respectively.

To permit the Federal Trade Commission to prevent fraudulent misbranding of merchandise is clearly not repugnant to the provision of the First Amendment that "Congress shall make no law.....abridging the freedom

of speech, or the press." But to permit the Commission to prevent fraudulent advertising in newspapers and magazines would seem to be repugnant to that provision of the Constitution,—as appears particularly, so far as concerns freedom of speech, from the considerations that are presented in the dissenting opinion in *Leach* v. *Carlile* (1922), 258 U. S. 138, 140-141.

Unless it be declared to be the law that the Commission has no power at all to prevent the publishing of any advertisements whatsoever—regardless of their character—in newspapers and magazines, the dangerous possibility of the Commission's interfering radically with freedom of speech, is obvious.

To perceive the dangerous possibility in that regard, all that is essential is to recall that the Commission is not subject to any restraint as to what complaints it shall issue, but that, given any situation in respect of which it could act at all, the Commission could file a complaint charging that the making in a newspaper or magazine advertisement of any statement whatsoever, of which the Commission disapproved,—even a statement of opinion, by regarding the doctrine of *Seven Cases* v. *United States* (239 U. S. 510),—constituted the using of an "unfair method of competition in commerce"; and to recall, further, that the Commission's findings, if supported by substantial evidence, are conclusively binding upon the courts,—which, would enable the Commission, if it could obtain any substantial evidence at all to support the charge contained in its complaint, to decide that its complaint had been proved, quite without regard to what the overwhelming weight of the evidence might be. What relief would be available to a person that had been injured by such an unscrupulous proceeding on the Commission's part,—if peradventure the Commission should ever act unscrupulously in such a way,—is not apparent.

Under the Constitution, the Government has no power to prevent the citizen from publishing fraudulent falsehoods in newspapers, if the citizen sees fit to publish them. The Constitution intends that the only deterrent to the publication of fraudulent falsehoods in newspapers shall lie in the risk that the publisher of such falsehoods incurs, that he may be compelled to answer in damages to any person that believes and relies upon such falsehoods, and is thereby induced to act, and does act, to his financial detriment.

Congress, it is respectfully submitted, never intended to give the Commission power to interfere in any degree with freedom of speech, whether in respect of the publication of newspaper and magazine advertisements, or in any other connection.

No expression is to be found in the lower court's opinion, in respect of the above point. But in respect of a somewhat narrower question—namely, whether the Commission's order in the case at bar is not repugnant to the First Amendment, as interfering with freedom of speech,—the lower court did say (R. 477):

> "Another contention should be noticed: Petitioner [the Raladam Company, respondent in this court] says to the public,—whether the statement happens to be in a printed form or orally,—that this remedy is safe to be taken according to directions by the average person; the Commission orders that the petitioner shall not make this statement unless modified in form to suit the Commission; that is, unless accompanied by the statement that it is safe only when medically supervised. Thereupon the court, acting as a court of equity, is asked to enjoin the publication. Petitioner contends that such injunction would be a violation of the First Amendment, and that its constitutional right to freedom of speech prevents such suppression. This contention is forcefully made, but we find it unnecessary to pass upon it."

Consideration of the restriction that appears in the Constitution in respect of abridging the freedom of the press, also requires—it is respectfully submitted—that the Commission should be declared to be without any power at all in respect of advertisements that are published in newspapers and magazines, whether such advertisements be fraudulent or not.

Doubtless out of deference to the provision of the Constitution, relating to the freedom of the press, the policy of Congress has always been, as far as has been discovered, to avoid adopting any measure that would, or might, lead to anything in the nature of the establishment of a press censorship.

As an illustration of such policy, reference may be made to the Food and Drugs Act (U. S. Code, Tit. 21, Secs. 7, 10, 11, 11a, 12). Such act gives the Department of Agriculture and the Department of Justice power to prevent the misbranding of foods and drugs; and doubtless it would have contributed to a more effectual suppression of the mischief at which such statute is directed, if Congress had empowered those departments to prevent the publication in newspapers or magazines of the same fraudulent statements, concerning foods and drugs, that such statute penalizes if and when such statements appear in the labels upon the foods and drugs themselves, or upon or in the packages containing them. But Congress did not seek to go that far, if it could, in the interest of efficiency in preventing the making of fraudulent representations concerning foods and drugs. It limited the operation of its inhibitions to that which had immediate physical relationship to the foods and drugs themselves.

As far as has been discovered, Congress does not appear ever to have sought to prevent any utterance, or the publication thereof, but has confined itself to punishing, or to preventing the circulation of, unlawful utterances. So far

as advertisements are concerned, Congress, as far as has been discovered, has not gone beyond providing, in substance, that advertisements concerning certain articles—as, for instance, advertisements of contraceptive or abortifacient drugs, or of obscene books or objects (U. S. Code, Tit. 18, Secs. 334, 396, 512)—shall not be circulated by use of the mails. And it would appear that rather strong reasons would have to exist, in order to justify a conclusion that Congress departed from its established policy, when it enacted the Trade Commission Act, and intended that such statute should be so construed and given effect as to enable the Commission to exercise a supervisory and preventive control, approximating to censorship, over what utterances an advertiser should make, or a publisher should publish, in newspapers and magazines.

If it should be contended that to construe the term "unfair methods of competition in commerce", as used in the Trade Commission Act, as extending to and including fraudulent advertising, would not give the Commission power to exercise a censorship over the advertising activities of newspapers and magazines, the reply is that the record in the case at bar supplies an empirical negation of such supposed contention. The record herein shows that, proceeding upon the assumption that the term "unfair methods of competition in commerce" includes fraudulent advertising, and upon the further assumption that power in the Commission to prevent "unfair methods of competition in commerce" embraces power to exercise control, in advance, to prevent the publication of fraudulent advertisements, the Commission has already established what amounts, in substance, to a very effectual censorship over the advertising columns of substantially all of the newspapers and magazines in the United States.

Thus, the record herein shows (R. 392-396, 400-404, 436-441), that on October 9, 1928,—while the Commission's proceeding against respondent was still pending before the Commission,—Hon. William E. Humphrey, the then Chairman of the Commission, purporting to act in his official character, made an address to the representatives of approximately 6000 publishers of newspapers and magazines, who were assembled in a "trade-practice conference".

The record does not show what a trade-practice conference is. But it may perhaps be a matter of which this court will deem it proper to take judicial notice, that a part of the Commission's "Rules of Practice and Procedure and Statements of Policy"—which particular part was adopted on April 30, 1925,—reads that, "The trade-practice conference affords, broadly stated, a means through which representatives of an industry voluntarily assemble, either at their own instance or that of the commission, but under the auspices of the latter, for the purpose of considering any unfair practices in their industry, and collectively agreeing upon and providing for their abandonment in cooperation with and with the support of the Commission." And an order—which, also, this court may perhaps think it proper to notice judicially—was entered by the Commission, on or about June 5, 1926, creating, within the Commission, a Division of Trade Practice Conferences and a Director of Trade Practice Conferences. Such order provides that such Director may call trade-practice conferences. The Government Printing Office has issued, for and in behalf of the Commission, several publications relating to trade-practice conferences, *e.g.*, "Trade Practice Submittals" (G. P. O., 1925); "Trade Practice Conferences" (G. P. O., March 15, 1928); "Trade Practice Conferences" (G. P. O., July 1, 1929).

Mr. Humphrey's above mentioned address contains internal evidence (R. 436, 437), that the newspaper and magazine publishers did not assemble in their trade-practice conference voluntarily, but at the instance and call of the Commission. In a report that was made by the Commission, dated November 12, 1928, relating to such trade-practice conference,—of which report, also, this court may consider that it can properly take judicial notice,—it is stated, "From the appearances entered, it is estimated that practically the entire periodical publishing field was represented, in person or through associations." A representative of a corporation named the National Better Business Bureau (R. 389), also was present at the conference (R. 436). According to the Commission's report, he "explained the mechanics of that organization"—the National Better Business Bureau—to the assembled publishers. Such report shows that the Chairman of the Federal Trade Commission presided over such conference, and that he was assisted by the Commission's Director of Trade Practice Conferences.

In the address (R. 436-441) that the Chairman of the Commission, Mr. Humphrey, made to the publishers' trade-practice conference, he told the assembled publishers, in substance, that the Federal Trade Commission, by virtue of its authority in respect of "unfair methods of competition in commerce", had a right, and the necessary power, to prevent the publication of fraudulent advertisements in newspapers and magazines; and that if the publishers should not take the precaution that the Commission considered that the publishers should take, in order to avoid publishing any advertisement that was fraudulent, then whenever any publisher published a fraudulent advertisement, the Commission, in the exercise of its statutory right and power, would institute a proceeding to prevent, by suit, the continued publication

of such fraudulent advertisement, and would join such publisher as a co-defendant in such proceeding, along with the advertiser for whom, and at whose request, such publisher had published such fraudulent advertisement.

The precaution that the assembled publishers agreed to take, and by a resolution that was adopted by the conference did take (R. 400-401),—with a view to avoiding the publishing of any fraudulent advertisement, and so saving themselves from the risk of being harrassed and annoyed by litigation instituted by the Commission,—was to bind themselves not to publish any advertisement that the National Better Business Bureau should deem fraudulent, and should accordingly forbid to be published.

The National Better Business Bureau regarded the adoption of such resolution by the publishers, as creating a "censorship of periodical publishers" (R. 403). It so stated, in effect, in a program or plan for suppressing fraudulent advertising, which it issued and distributed to periodical publishers throughout the country, in March, 1929 (R. 402-404).

The selection by the publishers of the National Better Business Bureau to act as a censor of advertising, can hardly be reasonably regarded as having been fortuitous, or otherwise than as having been dictated by the Commission.

The supposition that it was either purely by chance, or by their exercise of an unrestrained choice, that the publishers selected the Better Business Bureau to exercise censorship powers over their advertising columns, is negatived by the circumstance that the Commission had called, and was in charge of, the conference of the publishers, and that a representative of the National Better Business Bureau was present at the conference to explain

"the mechanics of such organization". It strains credulity to suppose that such representative's presence and activities at the conference were due to anything else than prearrangement between the Commission and the National Better Business Bureau, or were designed for any other purpose than that the National Better Business Bureau should be selected and empowered to act as censor of newspaper and magazine advertising.

The clear inference from the record is, not only that the selection of the National Better Business Bureau as censor was dictated to the publishers by the Commission, but also that the understanding was that the National Better Business Bureau should serve essentially as a mere screen or blind behind which, or as an instrumentality through which, the Commission itself should prescribe what advertisements should, and what should not, be published. The circumstances that sustain such inference,—in addition to the circumstance that it is only by presupposing the issuance of an invitation by the Commission, that the presence of a representative of the National Better Business Bureau at the publishers' trade-practice conference, can reasonably be accounted for,—are numerous.

Thus, the Commission (R. 401) approved and accepted the resolution of the publishers, whereby the latter had vested the National Better Business Bureau with censorship powers.

Again, the class of advertisements, in respect of which the National Better Business Bureau announced (R. 403-404) that it proposed first to exercise its censorship powers, was the same class of advertisements against which the Chairman of the Commission had long been issuing fulminations. In the address that Mr. Humphrey made to the assembled publishers, he said (R. 437-438):

> "The people are annually robbed of millions of dollars by false and misleading advertisements that appear in the periodicals of the country..... This class of advertisements takes its toll of millions annually from the sick, the unfortunate and the ignorant; those that are ready to try anything as a forlorn hope."

And in an address that Mr. Humphrey made on October 9, 1928, to the National Association of Purchasing Agents, he said, in part (R. 408):

> "The people of this country are annually robbed of hundreds of millions of dollars by false and misleading advertisements appearing in the newspapers and magazines. Some of the more glaring instances of this class of advertising might be cited:..... patent-medicine advertisements for incurable diseases, frequently injurious, never of any value, and often holding out false hopes, prevent the victim from seeking any real relief until too late;..... —all of them frauds and swindles, and perhaps the greatest of all just at the present moment are the various antifat remedies, appliances, soaps, belts, machines, powders and medicines, all of them fakes and all of them dishonest—and some of them dangerous."

In the same address, Mr. Humphrey indicated that he had been making addresses of like purport "For the last two years" (R. 408). And when the National Better Business Bureau issued its manifesto to the publishers in March, 1929, as to the class of advertisements in respect of which it intended first to exercise its powers as censor, it placed at the top of the list advertisements relating to "Medicinal drugs" of the "Fat reducing" class and of the "Glands" class (R. 403).

Moreover, there was the closest sort of cooperation between the National Better Business Bureau and the

Federal Trade Commission, in making effectual the exercise of the powers of censorship that had been ostensibly conferred upon only the National Better Business Bureau alone.

In such Bureau's proclamation of March, 1929, to the newspaper and magazine publishers (R. 403), the Bureau stated, in effect, that it would supply such information as it obtained concerning fraudulent advertisements, to the Federal Trade Commission; and that if any publisher should fail to make "satisfactory adjustment" in respect of advertising of a fraudulent character, the Bureau would present a formal complaint against such publisher to the Federal Trade Commission, because such action had been made incumbent upon the Bureau by the resolution that the publishers had adopted at their trade-practice conference. And the Bureau concluded that it was "desirable that the Federal Trade Commission cooperate with the periodical publishers and the Bureau to make the [censorship] agreement obtained at the trade-practice conference effective" (R. 403-404).

The record shows that the Federal Trade Commission did cooperate most actively, in order to make effectual the censorship that had been conferred ostensibly only upon the National Better Business Bureau alone.

On March 11, 1929,—about the time when the National Better Business Bureau issued its above mentioned proclamation to the periodical publishers, and before the Commission, on April 13, 1929 (R. 26), had issued against respondent its order to cease and desist—a publisher, in declining further to publish advertisements concerning respondent's Marmola treatment, wrote a letter in which such publisher stated, in substance, that it was being coerced into taking such position by the joint action of the National Better Business Bureau and the Federal Trade

Commission, acting co-operatively. "In view of recommendations of National Better Business Bureau and the Federal Trade Commission", wrote such publisher, "we can hardly do otherwise than to decline for the present, at least, to carry this [i.e., respondent's] advertising" (R. 404).

On April 8, 1929, another publisher, in refusing to publish advertisements relating to respondent's treatment, wrote in substance, by way of explaining such refusal, that it had been asked to appear, and had appeared by counsel, before the Commission, with reference to publishing advertisements concerning respondent's treatment; that, also, it had conferred as to that matter, with the Better Business Bureau; that it had been "given to understand that publishers accepting same [i. e., advertisements of respondent's treatment] may expect to face some difficulties in the near future"; and that it must accordingly decline to publish advertisements relating to respondent's treatment (R. 405).

On September 3, 1929, the same publisher, in repeating its refusal to publish advertisements of respondent's treatment, wrote by way of explanation that the Commission, recently theretofore, had sent out a bulletin that had contained a reference to such publisher that was not at all creditable, and that such publisher could not "afford to be made a defendant with too many advertisers in the suits instituted by the Federal Trade Commission" (R. 405-406).

The record contains other statements by publishers that tend to show that the Commission co-operated with the National Better Business Bureau to compel acquiescence on the part of the publishers in the exercise of the censorship powers that had been conferred ostensibly upon only such Bureau alone; and to show, also, that it was the

Commission's influence, rather than that of such Bureau, which compelled such acquiescence (R. 443, Ex. 4; R. 444, Ex. 7; R. 445, Ex. 9; R. 446, Ex. 10; R. 447, Ex. 12; R. 448, Ex. 13; R. 449, Ex. 15; R. 449-450, Ex. 16; R. 450, Ex. 17).

Further evidence that the Commission co-operated in, and was the real force in making effectual, the censorship that had been ostensibly vested in only the National Better Business Bureau alone, is found in a letter that Mr. Humphrey, the Chairman of the Commission, sent to the National Better Business Bureau on May 9, 1929, as follows (R. 406):

> "Replying to your communication with reference to Marmola [respondent's treatment], will say that it is my intention to file application for complaint against all publications that publish the advertisement of Marmola, unless they express an intention to discontinue it at once. You are at liberty to notify any of your publisher clients to this effect."

On May 16, 1929, the Commission's secretary sent the advertising agent that had charge of procuring the publication of respondent's advertisements—namely, Kling-Gibson Company—a notice to appear before the Commission and show cause why a complaint should not be issued against such agent, to compel it to desist from seeking further to procure the publication of respondent's advertisements (R. 441-442, 396-399). But when the Kling-Gibson Company gave evidence that it might not be easily imposed upon (R. 397-398), the Commission abandoned its effort to intimidate the Kling-Gibson Company.

The following month (June, 1929), the Southern Newspaper Publishers' Association and the American Newspaper Publishers' Association,—the respective membership lists of which embraced substantially all of the

newspaper publishers in the United States,—sent bulletins to all of their respective members, which substantially embodied the above quoted communication that the Commission's chairman had sent, for dessemination among publishers, to the National Better Business Bureau (R. 409-410).

Subsequently, on September 28, 1919,—which was after the respondent, Raladam Company, on May 16, 1929 (R. 385, 411), had filed its petition for review in the lower court,—the Commission by its Secretary, Hon. Otis B. Johnson, supplied to the Southern Newspaper Publishers' Association a further statement, which the latter sent to all of its members (R. 411, 412). Such statement was to the effect, in substance, that if any publisher should make publication of any advertisement concerning respondent's treatment, while respondent's petition for review was pending in the lower court, then, after the lower court had disposed of respondent's petition, the Commission would proceed against such publisher for having made such publication while respondent's petition was pending, unless the lower court, agreeably to the prayer of respondent's petition for review, should annul the Commission's order to cease and desist (R. 411).

The foregoing circumstances, it is respectfully submitted, fully sustain the assertion, made hereinabove, that the clear inference from the record is that, although the periodical publishers ostensibly vested censorship powers over fraudulent advertisements in only the National Better Business Bureau alone, the real effect of what the publishers did was to make the Commission the censor of fraudulent advertisements, and the National Better Business Bureau substantially only the catspaw of the Commission.

That the censorship, which the Commission brought into being and in effect exercised as above set forth, was highly effectual, appears abundantly from communications that appear in the record, whereby various publishers declined to publish advertisements relating to respondent's treatment, until after the question of the propriety of the Commission's having issued its order forbidding the publication of respondent's advertisements, had first been passed upon by the lower court (R. 404-406, 412-413, 443-451). Such censorship practically rendered it impossible for respondent to advertise its treatment at all (R. 412, 417), and nearly destroyed respondent's business altogether (R. 389, 416).

If it should be contended that the periodical publishers acted voluntarily in establishing the advertising censorship that came into being as above described, such contention could hardly be sustained. The circumstances that attended the genesis of such censorship, as above set forth, and the communications from publishers that are above referred to (R. 404-406, 412-413, 443-451), show that such censorship was imposed upon the periodical publishers against their will, and that the Commission engineered the creation of the censorship, and was the real and effectual—although screened—operator of the whole enterprise from the beginning.

The fundamental supposition upon which the entire censorship was brought into being and maintained, was that the term "unfair methods of competition in commerce", as used in the Trade Commission Act, embraces fraudulent advertising; and that because the Commission possesses power to institute proceedings, issue orders to cease and desist, and institute suits, in order to prevent the using of "unfair methods of competition in commerce", therefore it possesses power to institute pro-

ceedings, issue orders to cease and desist, and institute suits,—not only against tradesmen that seek to obtain the publication, but also against the publishers that make publication, of false advertisements,—to prevent false advertising. The truth of that assertion appears clearly, from noting what Mr. Humphrey said to the publishers that he had summoned to a trade-practice conference, when he sought to compel them to enter upon the censorship enterprise. His statements in that connection were in part as follows (R. 439, 440, 436, 437, 438, 440):

> "The law makes the publisher responsible for any false and misleading advertisements that he publishes (R. 439) . . . . . The presumption is always that no man knowingly violates the law. Therefore it is presumed that no publisher knowingly publishes false and misleading advertisements, which act is a violation of law (R. 440) . . . . . Whether or not any advertisement you accept is in fact fraudulent and misleading, is a matter for the [Federal Trade] Commission to decide" (R. 440).

> "I feel certain that we are going to have the earnest co-operation of practically every publisher in the country in our attempt to suppress fraudulent advertising (R. 436) . . . . . With the assistance of the honest publisher, false advertising can be practically eliminated. With the few dishonest and crooked who will not follow the judgment and wish of the majority, the commission will have to deal by proper action. As in all other industries, you have within your ranks those who violate the law (R. 437) . . . . The people are annually robbed of millions of dollars by false and misleading advertisements that appear in the periodicals of the country (R. 437-438) . . . . How can this gigantic evil of false advertising be suppressed? (R. 438) . . . . . What of the responsibility of the publisher? He becomes part of the plan. Without his assistance the consummation of the scheme would be impossible.

> Knowingly or unknowingly the publisher helps rob the unfortunate victim. He brings the victim and the crook together. He shares in the ill-gotten gains. In publishing such advertisement the publisher is violating the law. He is guilty of an unfair practice. In a suit by the Federal Trade Commission to suppress such advertising the publisher is not only a proper party, but under recent decisions he is a necessary party. The commission, as a public duty that it is under every obligation to perform, should make the publisher a party to all suits against fraudulent advertising by publication. These facts in regard to their responsibility seem not to be generally understood by the publishers. This is the outstanding reason why the commission has called this conference (R. 438) . . . . . I think you can now understand the reasons why the commission . . . . . asked the publishers of the country to voluntarily clean their own house, instead of the commission bringing numberless suits to compel such action (R. 438) . . . . . We . . . . . do not desire to involve any business in litigation if it can be avoided (R. 438) . . . . . But in an action brought against the publisher and the advertiser charging them with false and misleading advertising, the publisher who shows that he used reasonable care to ascertain the truth will find the discretion of the commission exercised in his favor when it comes to taking final action in the matter. In other words, while the law may require that the publisher shall be made a party to such action, the commission in its discretion will see that the honest publisher receives the consideration to which he is entitled" (R. 440).

The part of the record that has been examined above, is the part which Judge Denison appears to have had in mind when, in his opinion in the lower court, he said (R. 479):

"The Better Business Bureaus explain to their local newspapers and to the general periodicals that it would be wise to refuse this advertising. The chairman of the Commission, in public addresses, and in correspondence, advises the newspapers that they will be subject to prosecution by the Commission as defendants, to be joined with the advertisers, if they do not desist from such publications; and the newspapers may suspect that if they do not comply with the advice of the Better Business Bureaus their general advertising patronage from the membership of these bureaus will fall off. It appears that these methods of influence, carried on in this case before this cross suit for enforcement [meaning, the Commission's demand, asserted in and by a cross bill which it filed in the lower court as part of its answer (R. 385) to respondent's petition for review (R. 373), praying that its order to cease and desist, issued against respondent, be enforced] was commenced and while it has been pending, have destroyed a large part of petitioner's business [i.e., the business of the Raladam Company, respondent in this court] through refusals to accept this advertisement, and only the injunction of this court is needed to make the elimination complete."

However, against the contention that, out of consideration for preserving freedom of speech and of the press, the term "unfair methods of competition in commeree", as used in the Trade Commission Act, should be construed as above suggested,—so as to exclude fraudulent advertising in newspapers and magazines,—there stands the fact that several of the Courts of Appeals have, apparently without question, construed the term "unfair methods of competition in commerce", as embracing fraudulent advertising. But it does not appear that the propriety of so construing such term was challenged, in any case in any of the Courts of Appeals.

In some of the cases in which the practice of fraudulent advertising appears to have been regarded as constituting an "unfair method of competition in commerce", it is not possible to determine certainly, from the reports, whether the advertising involved was newspaper or magazine advertising, or some other kind of advertising; it is probably fair to surmise, however, at least in most of such cases, that it was newspaper or magazine advertising that was involved.

In other cases, a determination of the question of whether the term "unfair methods of competition in commerce" could be construed, consistently with the Constitution, as embracing fraudulent advertising, was not necessary to a disposition of the controversy involved. Thus, in some of such cases, fraudulent advertising did not stand alone, but was accompanied by some other fraudulent or oppressive practice; and such cases might have been decided precisely as they were in fact decided, if the element of fraudulent advertising had been wholly lacking. Thus, fraudulent advertising was combined with a disparaging of competitors, in *Sears, Roebuck & Co.* v. *Federal Trade Commission* (1919), 258 Fed. 307, (C. C. A. 7); with palming off, in *Fox Film Corporation* v. *Federal Trade Commission* (1924), 296 Fed. 353, (C. C. A. 2) and *Federal Trade Commission* v. *Balmé* (1928), 23 Fed. (2d) 615, (C. C. A. 2), in which *certiorari* was denied (277 U. S. 598); with misbranding, in *Proctor & Gamble Co.* v. *Federal Trade Commission* (1926), 11 Fed. (2d) 47, (C. C. A. 6), in which *certiorari* was denied (273 U. S. 717, 718); and with both misbranding and palming off, in *Royal Baking Powder Co.* v. *Federal Trade Commission* (1922), 281 Fed. 744 (C. C. A. 2), in *Masland Duraleather Co.* v. *Federal Trade Commission* (1929), 34 Fed. (2d) 733, (C. C. A. 3), in *Federal Trade Commission* v. *Kay* (1929), 35 Fed. (2d) 160, (C. C. A. 7),—in which *certiorari* was denied (281

U. S. 764),—and in *Lighthouse Rug Co.* v. *Federal Trade Commission* (1929), 35 Fed. (2d) 162, (C. C. A. 7).

In a case in which, as in the *Silver case* (289 Fed. 985), the court considers that the advertising that is attacked as fraudulent, is not fraudulent, it is, of course, not necessary to the disposition of the controversy before the court, that the court should decide whether the term "unfair methods of competition in commerce", when construed agreeably to the Constitution, includes or excludes fraudulent advertising.

There are, however, still other cases, in which no other alleged "unfair method of competition in commerce" than fraudulent advertising appears to have been involved, and the advertising that was in controversy was deemed fraudulent. And such cases could not have been disposed of as they were, unless the courts either decided silently that the term "unfair methods of competition in commerce", when properly construed, with reference to the Constitution, does include fraudulent advertising, or ignored such question altogether. *Guarantee Veterinary Co.* v. *Federal Trade Commission* (1922), 285 Fed. 853, (C. C. A. 2); *Federal Trade Commission* v. *Pure Silk Hosiery Mills, Inc.* (1925), 3 Fed. (2d) 105, (C. C. A. 7); *Indiana Quartered Oak Co.* v. *Federal Trade Commission* (1928), 26 Fed. (2d) 340, (C. C. A. 2), in which *certiorari* was denied (278 U. S. 245).

The cases above noted are not all of the cases involving fraudulent advertising that have been decided by the Courts of Appeals, but they are illustrative of all of the different kinds of cases that have been observed.

It is respectfully submitted that it is utterly inconsistent with freedom of speech and of the press, that the Commission should have power to issue a preventive order

forbidding the publication in newspaper and magazine advertisements of any statement whatsoever, whether fraudulent or not; and that therefore the term "unfair methods of competition in commerce" should be construed as excluding the publishing of newspaper and magazine advertisements altogether, whatsoever their character.

VIII.

INASMUCH AS THE POWER OF THE COMMISSION IS LIMITED TO INTERSTATE COMMERCE, THE COMMISSION HAD NO LAWFUL POWER TO DESTROY RESPONDENT'S BUSINESS, FOR THE BENEFIT OF THE MEDICAL PROFESSION,—WHICH WAS THE REAL, AS DISTINGUISHED FROM THE AVOWED, PURPOSE OF THE COMMISSION'S PROCEEDING AND ORDER AGAINST RESPONDENT.

The Commission can hardly contend seriously that it has any power to protect physicians,—who, in practicing their profession, are not engaged in interstate commerce at all,—from "unfair methods of competition in commerce" on anybody's part.

It was said by the lower court, by Judge Denison (R. 479):

> "When we search this record to find the legitimate activities which are to be protected against this unfair competition [i.e., the unfair competition that the Commission had charged against respondent] we observe only two such possible beneficiaries. One is the medical profession. It can not be seriously contended that the act was intended to protect any profession against encroachment; the aid of the Commission might be as logically given to physicians and surgeons as against chiropractors, or to lawyers as against incompetent will-draftsmen."

The courts are not obliged to accept the Commission's assertion as to what purpose the Commission holds in

view in instituting any proceeding, or issuing any order to cease and desist. The courts are at liberty to discern and to declare, and to act in respect of, what the record discloses to be the real, as distinguished from the avowed, purpose of any proceeding or order on the Commission's part. The courts are not obliged to stand by and acquiesce in a perversion by the Commission of its powers and authority.

In *Sinclair Refining Co.* v. *Federal Trade Commission* (1921), 276 Fed. 686, (C. C. A. 7),—affirmed (1923), 261 U. S. 463,—the Commission's order purported to be directed only to forbidding that the Refining Company should supply pumps to retail distributors of its oil, at a lower rental for such pumps than would yield the Refining Company a reasonable direct profit; and to forbidding that the Refining Company should require such retail distributors to use such pumps for storing or dispensing only such oil as was supplied by the Refining Company, and not by any other concern. The lower court did not hesitate to perceive and to declare, in substance (p. 689), that the real purpose of the Commission's order was not either of those that were declared therein; but that the Commission's real purpose was rather to forbid that the Refining Company should resort at all to a competitive practice—namely, the supplying of oil pumps to retailers—that cost so much money in its execution, as thereby to lie altogether beyond the financial reach of many of the Refining Company's competitors. And the Commission's order was set aside accordingly.

The Commission cannot be permitted to accomplish, by fiction, subterfuge, and indirection, that which it may not lawfully do openly and directly. As was shown in a preceding division of this argument, the record does not contain any substantial competent evidence that tends to show that respondent had any substan-

tial competition, or any real competitors, in the field of selling, in interstate commerce, proprietary medicinal antifat treatments for internal self-administration. In the light of the evidence in the record, and of the attitude of Mr. Humphrey, the Commission's chairman, towards vendors of proprietary antifat treatments (as shown by the record, and noted hereinabove), the protection of such vendors from the use of any "unfair method of competition in commerce" on respondent's part, cannot reasonably be regarded as the real object and purpose of the Commission's proceeding and order against respondent. The only persons whom the Commission can reasonably be regarded as having held in view, as deserving protection, or as having been intended to be protected, against the competition offered by respondent, were and are the members of the medical profession. They could best be protected by the destruction of respondent's business altogether. Indeed they could hardly be protected at all, otherwise. And the record justifies the conclusion that the destruction of respondent's business, rather than the regulation of respondent's competitive acts and practices, is what the Commission set out to acomplish, and tried to accomplish, by the proceeding and order that are now before the court.

The first three paragraphs of the Commission's order (R. 26),—namely, those that forbid that respondent should advertise its treatment as scientific,—are of small importance. Those paragraphs are properly to be regarded as mere make-weight provisions,—directed at something of relatively small importance to anybody, that could not be regarded, under any circumstances, as anything more reprehensible than mere puffing.

But the last three paragraphs of the Commission's order (R. 26-27),—namely, those that forbid that respondent should advertise that its treatment is susceptible of

being self-administered internally, with safety,—are of a different character.

As noted before, the respondent does not, in its advertisements or otherwise, make any express representation as to the safety of the self-administration of its treatment. The representation as to safety arises, and is made only, by implication, from the fact that respondent advertises its tablets as intended to be taken internally. And, as noted before, such implied representation is only that respondent's tablets may be taken by the average excessively fat person, with an average case of excessive fatness, with reasonable safety, under usual and ordinary conditions and circumstances.

Neither respondent's business, nor any other business, can be carried on successfully, unless the commodity offered for sale in such business can be advertised,—and advertised in newspapers and magazines, as well as by other means. And if the Commission had entered an order that went no farther than merely to require that the respondent should not, by its advertisements, raise the above stated implication of safety, unqualifiedly; if the Commission had entered an order that left it open to the respondent to choose what qualifying statements, consistent with the truth, it would insert in its advertisements, by way of limiting and modifying the general implication of reasonable safety that must necessarily arise out of, and attend, its advertising its treatment for internal administration at all,—the situation that would have been created by such supposed order on the Commission's part, conceivably might not have been completely destructive of all possibility of respondent's continuing to advertise its treatment, and so to continue carrying on its business, in some fashion. Conceivably, in such case, respondent might have been able to devise some qualifying statements, consistent with the truth, that it could have inserted

in its advertisements, so as thereby to be able to continue advertising its tablets, and thereby to continue its business, under such supposed order.

Such possibility, however, the order that was actually entered by the Commission appears plainly to have been specially devised to destroy. Such order leaves respondent no opportunity to seek for limiting, qualifying statements, such as, if inserted in its advertisements, would or might render its advertisements unobjectionable, and so enable respondent to go on doing business. The order that the Commission actually entered, specifies what single statement alone respondent may insert in its advertisements, by way of limiting the implication, which arises out of respondent's advertising its treatment for internal administration, that its treatment may be safely self-administered internally; and such single statement is, in substance (R. 26-27), a statement—a notice to the public—that respondent's treatment cannot be safely self-administered at all, except under the advice and direction of competent medical authority.

The presence in the Commission's order of the requirement that if respondent would advertise its treatment at all, it must advertise that such treatment cannot be safely self-administered except under medical surveillance, is the feature of the order that unmasks the real ultimate purpose of the order,—the purpose to prevent respondent from carrying on its business at all, and to destroy respondent's business altogether, in the interest of the medical profession.

Exposition can hardly be required to make plain that the Commission's order substantially forbids that respondent shall advertise its treatment at all, with any effect, or with any likelihood that advertising its treatment will result in sales thereof; and, hence, that such order sub-

stantially forbids that respondent shall continue its business at all. From the standpoint of rendering sales impossible, and of thereby destroying a proprietary medicine business, there is no perceptible practical difference between saying to a vendor of a proprietary medicine, "You shall not advertise your product for sale at all", and saying to him, "You may advertise your product for sale, provided that your warn people that they may not safely consume your product after they shall have purchased it, unless they shall first employ a competent physician and shall consume it under his direction and control." The likelihood of anybody's purchasing a treatment, after having been warned in advance, by the vendor thereof, that anybody purchasing such treatment may not safely use it, unless he shall first put himself in the hands of some member of the medical profession, is so exceedingly speculative and remote as to be negligible for all practical purposes.

Likewise, exposition can hardly be necessary in order to make plain that the Commission intended that the destruction of respondent's business, at which the Commission's order aimed at above noted, should be for the benefit of the medical profession, and not for the benefit of respondent's competitors, if any, in the field of selling, in interstate commerce, proprietary medicinal antifat treatments for self-administration internally.

The inescapable inference that the medical profession, and nobody else, was intended to be the beneficiary of the Commission's order, does not arise only from the terms of the order alone, and from the express mention of "competent medical authority" therein. Such inference arises also from the consideration that—even upon the assumption that respondent's advertisements were fraudulent, which, as has been shown, they were not—some other requirement than the one, which is imposed

by the Commission's order, that respondent's advertisements should inform all purchasers of its treatment that they should betake themselves to members of the medical profession for direction and advice, not only would have fully sufficed for the protection, but also would have been more protective, of all of respondent's competitors, if any, in the field of selling proprietary medicinal antifat treatments, in the field of interstate commerce. If the respondent should advertise its treatment, as commanded by the Commission, as unsafe to be taken except under medical surveillance, the natural effect would be to make the public believe that it was true,—or make it pause and consider whether it might not be true,—that no other proprietary medicinal antifat treatment could be taken safely, except under medical surveillance, either. For respondent to create such an impression upon the public, would be injurious to, not protective of, respondent's competitors, if any, in selling proprietary medicinal antifat treatments.

The conclusion is unavoidable that if the Commission had intended to accomplish nothing more than the protection of such competitors of respondent, if any, against being injured by respondent's advertisements, the Commission would have left it to respondent's ingenuity to devise what statement or statements, consistent with the truth, respondent would add to its advertisements, for the purpose of thereby modifying and limiting the implication of safety raised by its advertisements. That respondent could have done readily. It could have added to its advertisements statements that would have tended to bring respondent's advertisements into line with the testimony of the Commission's medical witnesses in all reasonable respects,—such statements, for instance, as that Marmola tablets were not intended for excessively fat persons that had tuberculosis (R. 213, 259-260), or were suffering from hyperthyroidism, or other statements.

The order that the Commission entered against respondent, constitutes a menace to every person engaged in selling any proprietary medicine, whether an antifat treatment or anything else. If the Commission can lawfully require respondent to insert in its advertisements a warning that no person may safely take its treatment except under the direction and advice of a competent physician, it can lawfully require that a similar warning shall be inserted in the advertisements of all other proprietary medicines, and thereby destroy all trade in proprietary medicines; because it appears affirmatively from the record herein (R. 95-96), that the Commission can obtain against any other proprietary medicine that is intended to be self-administered internally and contains any drug that has any physiological or pharmacological action, medical testimony to the effect that such proprietary medicine cannot be safely self-administered,—medical testimony, in other words, of the same sort as that upon which the Commission relies to justify its finding as to the falseness of respondent's implied representation, in its published advertisements, that its treatment can be safely self-administered. Inasmuch as it is doubtless true that every proprietary medicine that is intended for self-administration internally, contains some drug that has some physiological or pharmacological action, all that the Commission need do to put the vendors of all proprietary medicines out of business,—so far as their respective businesses may depend upon advertising,—is to institute against such vendors respectively, the same sort of proceeding that it instituted against respondent; call upon the members of the American Medical Association for the same sort of testimony that they supplied against respondent; and issue against such vendors respectively the same sort of order that was issued against respondent.

That the Commission's purpose was not to protect competition, and respondent's competitors, if any, in the proprietary medicinal antifat treatment trade, from being injured through respondent's advertisements, but was rather to destroy respondent's business, is shown not alone by the terms of the respondent's order, as hereinabove pointed out, but by other parts of the record also. And such other parts of the record show also that the Commission desires, if it can, to accomplish the destruction of the businesses of other vendors of proprietary medicines, as well as of respondent's business.

Thus, in his address that the Commission's Chairman, Mr. Humphrey, made to the newspaper and magazine publishers on October 9, 1928, at their trade-practice conference, he said (R. 437-438, 441):

> "The people are annually robbed of millions of dollars by false and misleading advertisements that appear in the periodicals of the country . . . . . This class of advertisement takes its toll of millions annually from the sick, the unfortunate and the ignorant; those that are ready to try anything as a forlorn hope. How can this gigantic evil of false advertising be suppressed? (R. 437-438) . . . . . Believing in the greatness of its [the publishing industry's] power and influence as I do and upon its sincere cooperation, I have a firm conviction that this conference will put more crooks and dishonest concerns *out of business* . . . . . than any one thing that has ever been done under the direction of a governmental agency" (R. 441).

And in the address that Mr. Humphrey, Chairman of the Commission, made to the National Association of Purchasing Agents, on October 9, 1928, he said (R. 408, 409):

> The magazines are filled with this class of advertisements I have mentioned [*i.e., inter alia,* "patent-

medicine advertisements for incurable diseases", and advertisements of "various methods of correcting bodily deformities", of "beauty creams and various rejuvenating cosmetics", of "various anti-fat remedies, appliances, soaps, belts, machines, powders, and medicines", and of "Hair restorers"]. The Department of Justice, the Post Office Department, and the Federal Trade Commission have all been trying to put these frauds *out of business* (R. 408) . . . . . We are going to fight these fakers and crooks and thieves until they are put *out of business*" (R. 409).

The record shows that, as previously mentioned, after the Commission, by its Chairman, Mr. Humphrey, had succeeded in coercing the newspaper and magazine publishers of the country, into consenting and submitting to the Commission's exercising, through the National Better Business Bureau, an effectual censorship over the advertising columns of the newspapers and magazines of the country, the National Better Business Bureau issued to such publishers a plan or program for conducting such censorship. Such program specified the advertising matter that was to be investigated with a view to preventing its publication, and stated that such advertising matter related, in the main, to "purported remedies, appliances, etc., which are detrimental to public health and welfare". Such "remedies, appliances, etc.," were grouped and enumerated in such program under the respective headings, "Medicinal drugs", "External health and beauty appliances" and "Tobacco cures" (R. 403). And who, after reading the record herein, can seriously doubt that the National Better Business Bureau acted in that regard, otherwise than as the Commission's agent, and under the Commission's wing, cover, and control?

The record further shows (R. 391, 407-412), that even while the question of the lawfulness of the Commission's

order to cease and desist was pending before the lower court, and before such question had been passed upon by the lower court, the Commission and the National Better Business Bureau,—acting cooperatively, and in utter and contemptuous disregard of the fact that the lower court then had the question of the propriety of the respondent's advertisements under consideration,—made vicious and aggressive use of the censorship that the Commission had brought into being, for the purpose of preventing the publication of advertisements relating to respondent's antifat treatment, and thereby nearly destroyed respondent's business altogether (R. 391, 407-412). That circumstance, colored as it was by conduct on the part of the Commission that approximated, if indeed it did not fully amount to, contempt of the lower court's dignity and jurisdiction, is eloquent of the Commission's real purpose and object in instituting its proceeding and issuing its order against respondent—namely, the purpose and object of accomplishing the immediate and complete destruction of respondent's business, by fair means or foul.

The circumstance, noted in a preceding division of this argument, that the Commission failed to adduce any substantial competent evidence that respondent had any substantial competition or any competitors in the field of selling proprietary medicinal antifat treatments for self-administration internally, further shows that the real purpose and end of the Commission's proceeding and order were the destruction of respondent's business, and not the protection of competition, or of respondent's competitors, against respondent's advertising, as constituting the using of an "unfair method of competition in commerce."

The circumstance that, as noted in a preceding division of this argument, an official of the American Medical Association,—the Director of its Bureau of Investigation—made a great effort to procure the nebulous evidence that

was adduced before the Commission in an effort to establish the existence of competition and competitors that was essential to confer upon the Commission even a specious semblance of jurisdiction, fortifies the conclusion that is compelled by the internal evidence contained in the terms of the Commission's order itself,—namely, the conclusion that the influence that was behind the Commission's proceeding and order against respondent was that of the medical profession, and that the medical profession was the intended beneficiary of the Commission's order, which it was hoped would put respondent out of business.

An observation by the lower court is relevant in the present connection. Judge Denison there said (R. 478-479):

> "The record here shows, without dispute or by implication which would hardly be denied, that the American Medical Association is engaged in a campaign against those proprietary remedies, which, it believes, ought to be used by the public either not at all or only under supervision. It has a bureau for that and other purposes, and the bureau employs a director. When it is thought that a particular advertisement should be stopped, this director takes the matter up with the Commission and with the association of 'Better Business Bureaus' which are scattered over the country. Thereupon the Commission, if it approves, files a complaint and eventually, if it is convinced of the truth of its complaint, makes the order to desist and refrain."

In view of the foregoing considerations, it is respectfully submitted that the only reasonable conclusion is that the real, as distinguished from the avowed, purpose of the Commission's proceeding and order against respondent, was not to afford protection, against respondent's advertisements, to competition, or to respondent's competitors,

in the field of selling proprietary medicinal internal anti-fat treatments in the field of interstate commerce, but was to destroy respondent's business, for the benefit of the medical profession, which is not engaged in interstate commerce; and that the institution of such proceeding, and the issuance of such order, by the Commission were therefore entirely outside the Commission's lawful powers, which are limited to protecting competition and competitors in interstate commerce.

IX.

THE ORDER TO CEASE AND DESIST THAT WAS ISSUED BY THE COMMISSION, IS SUCH IN ITS TERMS AS TO BE IN EXCESS OF THE COMMISSION'S LAWFUL POWER.

The Trade Commission Act empowers the Commission to do nothing more than to issue "an order requiring such person, partnership, or corporation [*i.e.*, the person, etc., that is being proceeded against by the Commission] to cease and desist from using such method of competition" [*i.e.*, the method "charged in the Commission's complaint"].

The last three paragraphs of the Commission's order (R. 26-27)—which, as has been noted, are the only paragraphs that are of critical importance to anybody—go beyond a mere command to "cease and desist". They are more than a merely prohibitive command. They are, in substance and effect, permissive at the least; and, indeed, they are more than merely permissive. Such paragraphs are affirmatively mandatory, subject to a condition precedent; and they are to take effect as an unconditional affirmative command if respondent shall do an act,—namely, advertise its treatment at all,—which, if respondent should omit, would be equivalent, for all practical purposes, to respondent's going out of business altogether.

In no aspect can such paragraphs be regarded as purely prohibitive, and nothing else. The truth of the above statements appears from an inspection of such paragraphs, which are as follows (R. 26-27):

> "It is now ordered that respondent Raladam Company . . . . . do cease and desist from directly or indirectly 1 . . . . 2 . . . . 3 . . . .
>
> 4. Representing that 'Marmola' can be taken without the advice and direction of competent medical authority as a safe and harmless remedy in the treatment of obesity.
>
> 5. Representing that 'Marmola' can be taken with no harmful result to physical health without the advice and direction of competent medical authority.
>
> 6. From representing 'Marmola' as a remedy for the treatment of obesity unless such representation is accompanied by a statement that 'Marmola' cannot be taken with safety to physical health except under the direction and advice of competent medical authority."

Such paragraphs of the Commission's order say that the respondent may advertise its treatment, if it will insert in its advertisements a statement that anybody buying respondent's treatment, for the purpose of taking it, should employ a physician if he would be safe; and to that extent, such paragraphs are permissive. Such paragraphs say, further, that if respondent shall advertise its treatment at all, it shall insert such statement in its advertisements; and to that extent such paragraphs are mandatory.

The Commission has no power to issue any affirmative order, whether such order be mandatory or merely permissive. If it should be conceded that the Commission has any such power, it would follow from such concession that the Commission could approve and authorize, in ad-

vance, the formation of any combination in restraint of trade, or the use of any competitive method, that the Commission might conceive to be of such a character as would save it from violating the Sherman Act or the other anti-trust laws of the United States. That Congress intended to give the Commission any such power, can hardly be contended with any force or reason. And that the Commission has no power to issue any affirmative order has been expressly decided.

Federal Trade Commission v. *Eastman Kodak Co.* (1927), 274 U. S. 619, 621-622, 623-624, is understood to hold, in substance, that the Commission has no power to issue an order that affirmatively directs or requires that anybody shall do anything.

In *J. W. Kobi Co.* v. *Federal Trade Commission* (1927) 23 Fed. (2d) 41, (C. C. A. 2), Judge Manton, speaking for the court, said (p. 41), "It is argued that the order of the Commission should be supplemented by directing affirmatively what the petitioner may do." And he pointed out the unsoundness of such argument by saying, "But the Commission exercises only the administrative function delegated by the Act."

The statute with reference to which Judge Manton thus spoke, was the Clayton Act (38 Stat. 730). But the Commission's power in respect of issuing orders under that Act, as appears from Section 11 thereof (38 Stat. 734), is the same precisely as its power under the Trade Commission Act,—power to issue an order to "cease and desist", and nothing else.

The conclusion that the Commission has no power to issue such a command as is embodied in the last three paragraphs of its order in the case at bar, follows also from a consideration of the provision of the First Amendment that forbids any abridging of the freedom of speech.

(See *Leach* v. *Carlile* (1922) 258 U. S. 138, 140-141.) Such order, in effect, declares to respondent, "This alone, and nothing else, is truthful and honest to say and this alone, and nothing else, you shall say, if you shall say anything at all, either expressly or by implication, concerning the safety of your treatment,—namely, that your treatment may not be safely self-administered except under the direction and advice of competent medical authority". It is difficult to perceive that such command is consistent with any degree of freedom of speech on respondent's part. Such command, in effect, puts respondent in a straitjacket, so far as its speech is concerned. Congress never intended that the Commission should set itself up as the sole judge and keeper of truth and honesty, or that it should assume to say to anybody, "This statement alone embodies truth and honesty, and no other statement does or can."

It is of course essential that the Commission's order shall contain a requirement that respondent's advertisements shall refer purchasers of its treatment to the medical profession for direction and advice, if the Commission's order is to accomplish that which, as pointed out in the preceding division of this argument, is the real purpose of the order,—namely, the destruction of respondent's business, for the benefit of the medical profession. But Congress never intended that the Commission should accomplish, or even seek to accomplish, any such result.

In view of the foregoing, it is respectfully submitted that the order that the Commission issued against respondent is in excess of the Commission's lawful powers.

X.

IT WAS NOT "TO THE INTEREST OF THE PUBLIC"—AS THAT TERM IS USED IN THE TRADE COMMISSION ACT—THAT THE COMMISSION SHOULD EITHER HAVE INSTITUTED ITS PROCEEDING, OR HAVE ISSUED ITS ORDER, AGAINST RESPONDENT.

The term "to the interest of the public" is, as is said in effect in the *Klesner case* (280 U. S. 19), a definition or description of a legal concept. But as such, it is undeniably vague. Congress appears, however, often to use such term, or its equivalent, for the purpose of expressing the legislative will; but whether it is to be concluded that Congress uses such term, or its equivalent, in the same sense, and as designating the same considerations and standards as guides for action, every time,—which conclusion would appear to follow necessarily from the premise that such term defines or describes a legal concept,—has not yet been decided. That the use by Congress of the term "to the interest of the public", or its equivalent, is becoming not infrequent, appears from the fact that in Section 12 of the Trading with the Enemy Act (40 Stat. 411, 460, 1020), in defining the powers of the Alien Property Custodian, Congress directed that the Alien Property Custodian should sell property at public sale, etc., "unless the President stating the reasons therefor, in the *public interest* shall otherwise determine." Also, in Sections 9 and 11 of the Radio Act of 1917 (44 Stat. 1166; 45 Stat. 373), the issuance of licenses for radio stations is made to depend, in part, upon what the licensing authority's view may be as to whether "*public* convenience, *interest*, or necessity", and "*public interest*, convenience, or necessity", will be served by issuing a license in a particular case.

In *United States* v. *Chemical Foundation* (1924), 294 Fed. 300, 307, (D. C. Del.),—affirmed (1925), 5 Fed. (2d)

191, (C. C. A. 3), and decree modified and affirmed (1926), 272 U. S. 1,—which arose under the Trading with the Enemy Act, Judge Morris, in the District Court, said at page 307:

> "Public interest is not a synonym for money. It may not be defined in terms of finance. It embraces all the great public needs. It permits dealing with the conditions which exist in the nation so as to bring out of them the greatest welfare of its people. With the safety of the nation, the permanence of peace and the health of its citizens it is vitally concerned. In the category of the great public needs these are not outranked by the nation's revenue."

It is difficult to believe that Congress intended, when it adopted the Trade Commission Act, that the Commission should be guided by such general considerations as those that are suggested by Judge Morris' language,—by a consideration of the "permanence of peace", for instance,—in determining whether or not the institution of a proceeding by the Commission, in respect of anybody's using any "unfair method of competition in commerce", would be "to the interest of the public".

The only authoritative declaration that has been discovered, in respect to what are the proper guides or standards with reference to which the Commission must act, if it would act lawfully, in determining whether the institution of a proceeding on its part would be "to the interest of the public", is found in the *Klesner case* (280 U. S. 19).

As the *Klesner case* (280 U. S. 19) is understood, it is held therein that it is not "to the interest of the public" that the Commission should institute a proceeding in respect of "a controversy essentially private in its nature" (p. 28),—even though such controversy involves unfair competition and a possible fraudulent deception of the

public. And in that case Mr. Justice Brandeis, for the court, said at pages 27-28:

> "This requirement [*i.e.*, the requirement of public interest] is not satisfied by proof that there has been misapprehension and confusion on the part of purchasers, or even that they have been deceived,—the evidence commonly adduced by the plaintiff in 'passing off' cases in order to establish the alleged private wrong . . . . . To justify filing a complaint the public interest must be specific and substantial. Often it is so, because the unfair method employed threatens the existence of present or potential competition. Sometimes, because the unfair method is being employed under circumstances which involve flagrant oppression of the weak by the strong. Sometimes, because, although the aggregate of the loss entailed may be so serious and widespread as to make the matter one of public consequence, no private suit would be brought to stop the unfair conduct, since the loss to each of the individuals affected is too small to warrant it."

It is respectfully submitted that the institution by the Commission of the proceeding that is involved in the case at bar, cannot be shown, by reference to any evidence that appears in the record, to have been "to the interest of the public", if the question of the presence or absence of public interest in the case at bar be determined by the application of any of the guides or standards that are stated in the *Klesner case* (280 U. S. 19) to be applicable to determine the existence or non-existence of public interest in any given case.

The respondent's advertisements do not threaten the existence of present or potential competition,—as has been shown.

The *Klesner case* (280 U. S. 19), as understood, does not mean that the Commission could prevent oppression of the

weak by the strong, unless such oppression were injurious to, and tended to suppress, competition; or that the Commission could act to prevent widespread small individual losses, unless such losses were on the part of the competitors of the person against whom the Commission proceeded, and not merely on the part of members of the purchasing public.

In view of the circumstance that even such nebulous evidence as the record contains on the subject, does not tend to show that there are more than two concerns, at the outside, that are even conjecturally engaged in selling internal antifat treatments in competition with respondent, the Commission's proceeding against respondent—even if it were a *bona fide* effort, which it is not, to protect such two concerns, and, through protecting them, to protect competition—could hardly be regarded as other than a proceeding in respect of "a controversy essentially private in its nature", even if such two concerns had appeared and complained of respondent's advertisements, which neither did.

As the lower court's decision is understood, the ground upon which the lower court concluded that the institution by the Commission of its proceeding, and its issuance of its order, against respondent were not "to the interest of the public", was that all of such competitors, if any, as respondent had, were "relatively disreputable", and that it was not to the public interest to afford them governmental protection for the purpose of assisting them to continue to carry on the kind of business that they were carrying on, in the manner in which they were conducting it.

In referring to the trade in which the respondent and its competitors, if any, were engaged, and pointing out that such trade is inimical to the public good, Judge Denison, in the lower court, said in part (469-470, 476, 478, 479):

> "The medical profession has always contended that auto-diagnosis, drug-store purchases, and self-medication are dangerous to the public health and ought to be suppressed or minimized. The evil, at least in some degree, is not to be denied (R. 469-470) . . . . . Very likely every member of this court will personally fully agree with this professional opinion that such public self-medication is unwise (R. 476) . . . . . It must be evident that the trade which was to be protected against restraint (and unfair competition is a kind of restraint) was that legitimate trade which was entitled to hold its own in the trade field without embarrassment from unfair competition (R. 478) . . . . . It appears that these methods of influence [meaning, the methods of influence by which, as appears at pages 389, 392-413, 436-452 of the record, the Commission had brought about a concerted boycott of respondent by the publishers of various newspapers and magazines throughout the country, and a concerted refusal by such publishers to print any advertisement of respondent's Marmola treatment] . . . . . have destroyed a large part of petitioner's business [meaning, the business of the Raladam Company, respondent in this court] through refusals to accept this advertisement, and only the injunction of this court is needed to make the elimination complete. We have no occasion to deny, nor indeed, reason to doubt, that this elimination would tend to the public good" (R. 479).

In referring to the character of respondent's competitors, and pointing out that they were all engaged in improper practices, Judge Denison, in the lower court, said in part (R. 478, 479-480):

> "It must be evident that the trade which was to be protected against restraint (and unfair competition is a kind of restraint) was that legitimate trade which was entitled to hold its own in the trade field without embarrassment from unfair competition (R.

> 478) . . . . . When we search this record to find the legitimate activities which are to be protected [*i.e.*, by the Commission's order] against this unfair competition [*i.e.*, the alleged unfair competition charged against respondent], we observe only two such possible beneficiaries. One is the medical profession [not entitled to protection, because not engaged in interstate commerce] . . . . . The other possible beneficiary is found in the list which the American Medical Association Bureau has made up, comprising a number of other commercially exploited remedies for obesity . . . . . It is fairly to be inferred, not only that these [meaning, the other commercially exploited remedies] are on the same *index expurgatorius* as Marmola, but that they are relatively disreputable. Again it cannot be seriously contended that the machinery of the Commission was intended to give governmental aid to the protection of this kind of trade and commerce" (R. 479-480).

In a footnote (R. 479), Judge Denison said, in substance, that the Commission had erred, in having refused, as it had (R. 133), to permit respondent to establish by affirmative proof more positively than respondent had been permitted to do, the fact that the "other commercially exploited remedies", if any, that were being sold in competition with respondent's Marmola treatment, were "relatively disreputable"; "but", said Judge Denison, "the situation is too plain to require reference for further proofs."

What Judge Denison had reference to,—when he remarked that the Commission had erred in shutting off the respondent's proof as to the "relatively disreputable" character of the concerns that were being paraded by the American Medical Association as respondent's competitors,—appears in the record, at page 133. It there appears that counsel for the respondent—referring to the products

of a number of concerns, the names of which had been read into the record by Dr. Cramp (the Director of the Bureau of Investigation of the American Medical Association) from a list that he had prepared from such Bureau's files and records—put this interrogatory to Dr. Cramp, who was testifying: "Q. Does the American Medical Association regard any of these products, or the products made by the names stated in the list, as ethical products?" An objection to such interrogatory was sustained. And counsel for respondent then said (R. 133): "It is my contention that there is no proof of unfair competition in interstate commerce. These products or the manufacturers of the products that are contained in this list that was read into the record by my understanding are all under the ban of the American Medical Association, every one of them, and it is my understanding that this proceeding is not brought for the purpose of protecting them or any one of them from the competition of the respondent in this case, and I wish to show this to be a fact. That is the purpose of my question."

Additional light upon the considerations that moved the lower court to take the position that it did take as above noted, in respect of the question of public interest in the case at bar, may be obtained from a consideration of what Judge Denison said, subsequent to the decision of the case at bar, in *Ohio Leather Co.* v. *Federal Trade Commission* (1930), 45 Fed. (2d) 39, (C. C. A. 6).

In the *Ohio Leather Company's case* (45 Fed. (2d) 39), the Leather Company was charged with having used an "unfair method of competition in commerce", in that it had advertised a leather,—which it held out in its advertisements as "a distinctive calf leather",—under the trade name of Kaffor-Kid (calf-for-kid). The Commission's contention was that the public understood the word *kid*,

as applied to leather, to mean only leather that had been prepared from the skins of young goats, and nothing else; and that the public would be misled and deceived—by the presence of the word *kid* in the name Kaffor-Kid—into buying leather, and articles made of leather, that had been prepared from the skins of calves, and not from the skins of young goats. The court held that the record did not contain sufficient evidence to show that the public understood the word *kid*, in the exclusive sense that was contended for by the Commission, as meaning only leather that had been prepared from the skins of young goats, and nothing else. The court held, further, that it would not be of any avail to send the case back to the Commission, for the purpose of enabling the latter to seek to obtain additional evidence to establish that the public understood the word *kid* in the exclusive sense for which the Commission contended; because, as the court said in substance, even if the Commission should succeed in obtaining such additional evidence, the Commission, in view of other facts that appeared in the record, would still remain without power to issue any lawful order to cease and desist against the Leather Company. The other facts that, in the court's view, disabled the Commission to enter any lawful order against the Leather Company, were that all other manufacturers of leather, and all manufacturers of shoes, used the word *kid* quite as misleadingly—judged with reference to what the Commission insisted was the public's understanding of the meaning of the word—as did the Leather Company, in that all of such manufacturers used the word *kid* to designate something other than leather prepared from the skins of young goats only, and applied such word to leather prepared from the skins of old goats, and also to leather prepared from the skins of certain sorts of sheep. As the opinion of the court is understood, the court based its decision upon a consideration of the interest of the public.

Judge Denison, for the court, said at page 42:

"We recently had occasion to reaffirm our belief that there is no jurisdiction in the Commission to make an order of this kind unless there is a legitimate trade which equitably deserves protection in order that the defendant's unfair methods may not tend to restrain the trade of the fair and legitimate competitors. *Raladam Co.* v. *F. T. C.*, 42 F. (2d) 430, 435, *certiorari* now allowed 51 S. Ct. 86, 75 L. Ed. ..... [94]. The present record presents this question in a peculiar form. The manufacturers of what they call kid leather, and possibly, in some measure, the manufacturers of calfskin, may suffer from this method of competition—the former, if trade is diverted from the goatskin by the supposition that 'Kaffor-Kid' is the same thing, and the latter, if trade is diverted from the regular calfskin by advertising something as if better but perhaps at the same price. We do not suppose that the Commission's typical order to desist and refrain is made an inappropriate remedy, merely because *some* of a respondent's trade competitors are using the same unfair method which is charged against it; the Commission could not stop all these things at once; but, in that aspect of the Commission's future action in this case which may rest upon the theory that the ultimate purchaser supposes that kid is kid, and that kid shoes are made from kid leather which is made from kid skins, and thus is misled because the defendant is tacking the name to leather not made of those skins at all, we find that *the entire* associated trade, which is complaining and which the Commission is intending to protect, is also misleading the ultimate purchaser in a similar way. Lacking any proof that the purchaser did know anything about the secondary meaning which prevails among the experts, the result would be that the Commission stops the defendant from misleading the purchaser, and does so with the sole purpose and sole result of aiding and

abetting a much greater volume of misleading practice by the rest of the trade. We can confidently say that no such result, coming from such construction of the act, can have been intended by Congress."

Judge Denison's above quoted language shows the basis upon which the case at bar is to be distinguished in principle from the cases that are cited at pages 31 and 32 of the Commission's brief.

John Bene & Sons, Inc. v. *Federal Trade Commission* (1924), 299 Fed. 468, (C. C. A. 2), is understood to rest upon the same general view in respect of the public interest, as that which is understood to have been asserted by the lower court in the case at bar, and in the *Ohio Leather Company's case* (45 Fed. (2d) 39).

In the *Bene case* (299 Fed. 468), the corporation that the Commission proceeded against,—which, for convenience, may be referred to as Bene,—made and sold peroxide of hydrogen. A competitor, one Proper, made and sold a compound, called Daxol, which he represented to be good for the same purposes as those for which peroxide of hydrogen may properly be used. In truth, Daxol was a demonstrably fraudulent product, and Proper's representations concerning it were grossly fraudulent. Bene aggressively and convincingly disparaged Proper's product,—told substantially the demonstrable truth about it—to the chain-stores that were buying it, and they ceased to buy any more Daxol, to the practical destruction of Proper's business. The Commission ordered that Bene cease and desist from disparaging Daxol. But the court declined to enforce the Commission's order. Judge Hough, for the court, referring to Daxol, said (p. 473), "The public has no interest in the protection of such an article."

In view of the foregoing, it is respectfully submitted that —even upon the assumption that respondent was guilty of using an "unfair method of competition in commerce", which it was not—the lower court was right in declaring that, having regard for the relatively disreputable character of all of respondent's competitors, if any, it was not "to the interest of the public" that the Commission should have instituted its proceeding and issued its order against respondent.

XI.

CONCLUSION.

In view of the foregoing considerations, it is respectfully submitted that the decree of the lower court should be affirmed.

Respectfully submitted,

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Of Counsel for Respondent.

April, 1931.

SUPREME COURT OF THE UNITED STATES.

No. 484.—October Term, 1930.

Federal Trade Commission, Petitioner,
vs.
Raladam Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[May 25, 1931.]

Mr. Justice Sutherland delivered the opinion of the Court.

Under § 5 of the Federal Trade Commission Act, c. 311, 38 Stat. 717, 719 (U. S. C., Title 15, § 45), the relevant parts of which are copied in the margin,* the Commission issued its complaint charging the respondent with using unfair methods of competition in interstate commerce.

*That unfair methods of competition in commerce are hereby declared unlawful.

The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. . . . If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition.

Respondent manufactures a preparation for internal use, denominated an "obesity cure." The complaint charges that this preparation is sold by respondent in and throughout the several states, generally to wholesalers who resell to retailer dealers, and these, in turn, to consumers; that it is offered for sale and sold in competition with other persons who are engaged "in offering for sale, and selling, printed professional advice, books of information and instruction, and other methods and means and certain remedies and appliances for dissolving or otherwise removing excess flesh of the human body"; that respondent advertises in newspapers, etc., circulated generally in the United States, and in printed labels, etc., that the preparation is the result of scientific research, knowledge and accuracy, that it is safe and effective and may be used without discomfort, inconvenience or danger of harmful results to health. Among the ingredients is "desiccated thyroid," which, it is alleged, cannot be prescribed to act with reasonable uniformity on the bodies of all users, or without impairing the health of a substantial portion of them, etc., or with safety, without previous consulation with, and continuing observation and advice of, a competent medical adviser. The complaint further avers that many persons are seeking obesity remedies, and respondent's advertisements are calculated to mislead and deceive the purchasing public into the belief that the preparation is safe, effective, dependable, and without danger of harmful results. By way of conclusion, it is said that "the acts and practices of the respondent are all to the prejudice of the public and of competitors of respondent, . . . and constitute unfair methods of competition."

Respondent answered and hearings were had before an examiner. The Commission found against respondent and issued a cease and desist order. The findings in general follow the language of the complaint. There was no finding of prejudice or injury to any competitor, but the conclusion was drawn from the findings of fact that the practice of respondent was to the prejudice of the public and respondent's competitors, and constituted an unfair method of competition.

The court of appeals reviewed the action of the Commission upon respondent's petition, and reversed the order. 42 F. (2d) 430. We brought the case here by certiorari, limiting the briefs

and argument to the question of the jurisdiction of the Commission. — U. S. —.

In substance the Commission ordered the respondent to cease and desist from representing that its preparation is a scientific method for treating obesity, is the result of scientific research, or that the formula is a scientific formula; and from representing its preparation as a remedy for obesity, unless accompanied by the statement that it cannot be taken safely except under medical advice and direction. Findings, supported by evidence, warrant the conclusion that the preparation is one which cannot be used generally with safety to physical health except under medical direction and advice. If the necessity of protecting the public against dangerously misleading advertisements of a remedy sold in interstate commerce were all that is necessary to give the Commission jurisdiction, the order could not successfully be assailed. But this is not all.

By the plain words of the act, the power of the Commission to take steps looking to the issue of an order to desist depends upon the existence of three distinct prerequisites: (1) that the methods complained of are *unfair*; (2) that they are methods of *competition* in commerce; and (3) that a proceeding by the Commission to prevent the use of the methods appears to be in the *interest of the public.* We assume the existence of the first and third of these requisites; and pass at once to the consideration of the second.

Section 5 of the Trade Commission Act is supplementary to the Sherman Anti-Trust Act and the Clayton Act. *Federal Trade Comm.* v. *Beech-Nut Co.*, 257 U. S. 441, 453. The latter was discussed and passed at the same session of Congress. The Sherman Act deals with contracts, agreements and combinations which tend to the prejudice of the public by the undue restriction of competition or the undue obstruction of the due course of trade, *United States* v. *American Tobacco Co.*, 221 U. S. 106, 179; and which tend to "restrict the common liberty to engage therein." *United States* v. *Patten*, 226 U. S. 525, 541.

The Clayton Act, so far as it deals with the subject, was intended to reach in their incipiency agreements embraced within the sphere of the Sherman Act. *Standard Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 355-357. The object of the Trade Commission Act was to stop in their incipiency those methods of com-

petition which fall within the meaning of the word "unfair." "The great purpose of both statutes was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain." *Fed. Trade Comm.* v. *Sinclair Co.*, 261 U. S. 463, 476. All three statutes seek to protect the public from abuses arising in the course of competitive interstate and foreign trade. In a case arising under the Trade Commission Act, the fundamental questions are, whether the methods complained of are "unfair," and whether, as in cases under the Sherman Act, they tend to the substantial injury of the public by restricting competition in interstate trade and "the common liberty to engage therein." The paramount aim of the act is the protection of the public from the evils likely to result from the destruction of competition or the restriction of it in a substantial degree, and this presupposes the existence of some substantial competition to be affected, since the public is not concerned in the maintenance of competition which itself is without real substance. Compare *Internat. Shoe Co.* v. *Comm'n*, 280 U. S. 291, 297-299.

The bill which was the foundation of the Act, as it first passed the Senate, declared "unfair competition" to be unlawful. Debate apparently convinced the sponsors of the legislation that these words, which had a well settled meaning at common law, were too narrow. When the bill came from conference between the two Houses, these words had been eliminated and the words "unfair methods of competition" substituted. Undoubtedly the substituted phrase has a broader meaning but how much broader has not been determined. It belongs to that class of phrases which does not admit of precise definition, but the meaning and application of which must be arrived at by what this court elsewhere has called "the gradual process of judicial inclusion and exclusion." *Davidson* v. *New Orleans*, 96 U. S. 97, 104. The question is one for the final determination of the courts and not of the Commission. *Federal Trade Comm.* v. *Gratz*, 253 U. S. 421, 427; *Federal Trade Comm.* v. *Beech-Nut Co., supra*, p. 453.

The authority of the Commission to proceed, if that body believes that there has been or is being used any unfair method of competition in commerce, was then qualified in conference by the further requirement, not in the original bill,—"and if it shall

appear to the commission that a proceeding by it in respect thereof would be to the interest of the public." By these additional words, protection to the public interest is made of paramount importance, but, nevertheless, they are not substantive words of jurisdiction, but complementary words of limitation upon the jurisdiction conferred by the language immediately preceding. Thus, the Commission is called upon first to determine, as a necessary prerequisite to the issue of a complaint, whether there is reason to believe that a given person, partnership or corporation has been or is using any unfair method of competition in commerce; and that being determined in the affirmative, the Commission still may not proceed unless it further appear that a proceeding would be to the interest of the public, and that such interest is specific and substantial. *Federal Trade Comm.* v. *Klesner*, 280 U. S. 19, 28. Unfair trade methods are not *per se* unfair methods of *competition.*

It is obvious that the word "competition" imports the existence of present or potential competitors, and the unfair methods must be such as injuriously affect or tend thus to affect the business of these competitors—that is to say, the trader whose methods are assailed as unfair must have present or potential rivals in trade whose business will be, or is likely to be, lessened or otherwise injured. It is that condition of affairs which the Commission is given power to correct, and it is against that condition of affairs, and not some other, that the Commission is authorized to protect the public. Official powers cannot be extended beyond the terms and necessary implications of the grant. If broader powers be desirable they must be conferred by Congress. They cannot be merely assumed by administrative officers; nor can they be created by the courts in the proper exercise of their judicial functions.

The foregoing view of the powers of the Commission under the Act finds confirmation, if that be needed, in the committee reports and the statements of those in charge of the legislation, as well as in the debate which took place in the Senate, extending over weeks of time and covering hundreds of pages in the Congressional Record. In that debate the necessity of curbing those whose unfair methods threatened to drive their competitors out of business was constantly emphasized. It was urged that the best way to stop monopoly at the threshold was to prevent unfair competition; that the unfair competition sought to be reached was that which must

ultimately result in the extinction of rivals and the establishment of monopoly; that by the words "unfair methods" was meant those resorted to for the purpose of destroying competition or of eliminating a competitor or of introducing monopoly—such as tend unfairly to destroy or injure the business of a competitor; that the law was necessary to protect small business against giant competitors; that it was an effort to make competition stronger in its fight against monopoly; that unfair competition was that practice which destroys competition and establishes monopoly. These and similar statements run through the debate from beginning to end. Although protection to the public interest was recognized as the ultimate aim, comparatively little was said about it.

It is true, at least generally, that statements made in debate cannot be used as aids to the construction of a statute. But the fact that throughout the consideration of this legislation there was common agreement in the debate as to the great purpose of the act, may properly be considered in determining what that purpose was and what were the evils sought to be remedied. In *Ah Kow* v. *Nunan*, 5 Sawy. 552, it appeared that the Board of Supervisors of San Francisco had adopted an ordinance which provided that every male person imprisoned in the county jail, etc., should immediately upon his arrival at the jail have the hair of his head "cut or clipped to an uniform length of one inch from the scalp thereof." The ordinance was attacked as being hostile and discriminating legislation against the Chinese, and in order to demonstrate this, in spite of the general terms of the ordinance, statements of supervisors made in debate were put in evidence. Mr. Justice Field, speaking for himself and Judge Sawyer, said (p. 560):

"The statements of supervisors in debate on the passage of the ordinance cannot, it is true, be resorted to for the purpose of explaining the meaning of the terms used; but they can be resorted to for the purpose of ascertaining the general object of the legislation proposed, and the mischiefs sought to be remedied."

While it is impossible from the terms of the act itself, and in the light of the foregoing circumstances leading up to its passage, reasonably to conclude that Congress intended to vest the Commission with the general power to prevent all sorts of unfair trade practices in commerce apart from their actual or potential effect

upon the trade of competitors, it is not necessary that the facts point to any particular trader or traders. It is enough that there be present or potential substantial competition, which is shown by proof, or appears by necessary inference, to have been injured, or to be clearly threatened with injury, to a substantial extent, by the use of the unfair methods complained of.

In *Federal Trade Comm.* v. *Winsted Co.*, 258 U. S. 483, it appeared that a manufacturer engaged in selling underwear and other knit goods made partly of wool, labeled them as "natural merino," "natural wool," "Australian wool," etc. It was shown that a substantial part of the consuming public and some buyers and retailers understood the words used in the labels to mean that the underwear was all wool. Part of the public was thereby misled into selling or into buying, as all wool, underwear which was in large part cotton. The labels were false and calculated to deceive, and did in fact deceive, a substantial portion of the purchasing public. This court, after saying that the facts show that a proceeding to stop the practice was in the interest of the public, added (page 493):

"And they show also that the practice constitutes an unfair method of competition as against manufacturers of all wool knit underwear and as against those manufacturers of mixed wool and cotton underwear who brand their product truthfully. For when misbranded goods attract customers by means of the fraud which they perpetrate, trade is diverted from the producer of truthfully marked goods. That these honest manufacturers might protect their trade by also resorting to deceptive labels is no defense to this proceeding brought against the Winsted Company in the public interest."

And again, at page 494, after reaffirming the existence of the public interest, the court said:

". . . since the business of its trade rivals who marked their goods truthfully was necessarily affected by that practice, the Commission was justified in its conclusion that the practice constituted an unfair method of competition; . . ."

The court below thought that the trade to be protected "was that legitimate trade which was entitled to hold its own in the trade field without embarrassment from unfair competition." There is much force in this conception of the act, and the language just quoted from the *Winsted* case seems inferentially to lend it support. Certainly, it is hard to see why Congress would set itself to the

task of devising means and creating administrative machinery for the purpose of preserving the business of one knave from the unfair competition of another. In the present case, however, we do not find it necessary further to consider the merits of this view or to determine whether the facts are such as to bring the case within it.

Findings of the Commission justify the conclusion that the advertisements naturally would tend to increase the business of respondent; but there is neither finding nor evidence from which the conclusion legitimately can be drawn that these advertisements substantially injured or tended thus to injure the business of any competitor or of competitors generally, whether legitimate or not. None of the supposed competitors appeared or was called upon to show what, if any, effect the misleading advertisements had, or were likely to have, upon his business. The only evidence as to the existence of competitors comes from medical sources not engaged in making or selling "obesity cures," and consists in the main of a list of supposed producers and sellers of "anti-fat remedies" compiled from the files and records of the Bureau of Investigation of the American Medical Association, a list which appears to have been gathered mainly from newspapers and advertisements. The only specific evidence was that of a witness who said that he had purchased in drug stores in Chicago five different anti-fat treatments and could have purchased a sixth. How long they had been in stock, what was their nature, whether they were intended to be used internally, or in what way they competed or could compete with respondent's preparation does not appear. Of course, medical practitioners, by some of whom the danger of using the remedy without competent advice was exposed, are not in competition with respondent. They follow a profession and not a trade, and are not engaged in the business of making or vending remedies but in prescribing them. It is impossible to say whether, as a result of respondent's advertisements, any business was diverted, or was likely to be diverted, from others engaged in like trade, or whether competitors, identified or unidentified, were injured in their business, or were likely to be injured, or, indeed, whether any other anti-obesity remedies were sold or offered for sale in competition, or were of such a character as naturally to come into any real competition, with respondent's preparation in the interstate market. All this was left without proof and remains, at best, a matter of conjecture. Something more

substantial than that is required as a basis for the exercise of the authority of the Commission.

Whether the respondent, in what it was doing, was subjecting itself to administrative or other proceeding under the statute relating to the misbranding of foods and drugs we need not now inquire, for the administration of that statute is not committed to the Federal Trade Commission.

A proceeding under § 5 is not one instituted before the Commission by one party against another. It is instituted by the Commission itself, and is authorized whenever the Commission has reason to believe that unfair methods of competition in commerce are being used, and that a proceeding by it in respect thereof would be to the interest of the public. Acting upon its belief, the Commission issues charges and enters upon an inquiry which, of course, it has jurisdiction to make. But one of the facts necessary to support jurisdiction to make the final order to cease and desist, is the existence of competition; and the Commission cannot, by assuming the existence of competition, if in fact there be none, give itself jurisdiction to make such an order. If, as a result of the inquiry, it turn out that the preliminary assumption of competition is without foundation, jurisdiction to make that order necessarily fails, and the proceeding must be dismissed by the Commission. Compare *Federal Trade Comm.* v. *Klesner, supra,* pp. 29-30. That course should have been followed here.

The decree of the court below is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.